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IN THE

Supreme Court of the United States

UTILITIES COMMISSION,
CITY OF NEW SMYRNA BEACH, FLORIDA,
Petitioner,

v.

TAMPA ELECTRIC COMPANY, FLORIDA POWER & LIGHT COMPANY, AND FLORIDA POWER CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Florida

PETITION FOR CERTIORARI

STEVEN G. GEY
Counsel of Record
MARK SEIDENFELD
FLORIDA STATE UNIVERSITY
College of Law
425 West Jefferson Street
Tallahassee, Florida 32306-1601
(850) 644-3400

ROBERT SCHEFFEL WRIGHT
JOHN T. LAVIA, III
LANDERS & PARSONS, P.A.
P.O. Box 271
Tallahassee, Florida 32302
(850) 681-0311

Counsel for Petitioner
Utilities Commission,
City of New Smyrna Beach, Florida

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QUESTIONS PRESENTED

1. Does the Energy Policy Act of 1992, which was enacted by Congress to secure the benefits of competition in the wholesale sector of the U.S. electricity industry, preempt an interpretation of Florida law that requires potential wholesale power suppliers to contract to sell all of their output to Florida retail-serving utilities and to demonstrate specific retail need for that output in order to build and operate power plants intended to supply power to the interstate wholesale power market?

2. Does this Court's dormant Commerce Clause jurisprudence prohibit the Florida Supreme Court from requiring out-of-state companies seeking to build wholesale "merchant" power plants in Florida to contract with in-state retail-serving utilities as a condition of obtaining the necessary permits to construct and operate their plants?

PARTIES TO THE PROCEEDING

The following entities are parties to the proceeding in the court below:

Tampa Electric Company; Florida Power Corporation; and Florida Power & Light Company, appellants; Joe Garcia et al., as the Florida Public Service Commission; Utilities Commission, City of New Smyrna Beach, Florida; Duke Energy New Smyrna Beach Power Company Ltd., L.L.P.; PG&E Generating (formerly known as U.S. Generating Company); and Legal Environmental Assistance Foundation, appellees; and Enron North America, *Amicus Curiae*.

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OPINIONS BELOW

The decision of the Supreme Court of Florida, reported as *Tampa Electric Co., et al., v. Joe Garcia, et al.*, 767 So. 2d 428 (Fla. 2000), appears as Appendix A (1a). The Florida court's order denying rehearing appears as Appendix B (17a). The order of the Florida Public Service Commission that was reversed by the Florida court, reported as *In Re: Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P.*, 99 FPSC 3:401 is included as Appendix C (20a).

JURISDICTION

The initial opinion of the Florida Supreme Court was entered on April 20, 2000. The revised opinion of the Florida Supreme Court was entered on September 28, 2000, and motions for rehearing were denied on that same date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

Petitioner, Utilities Commission, City of New Smryna Beach, Florida ("New Smyrna Beach" or "Petitioner") expressly raised the federal statutory and constitutional issues in the Florida Supreme Court. The Florida Supreme Court noted that Petitioner raised the federal statutory issues. *Garcia*, 767 So.2d at 431, 433. The Florida court also acknowledged that New Smyrna Beach presented its federal constitutional claims on appeal. Specifically, the Florida Supreme Court noted Petitioner's argument that "prohibiting Duke [Petitioner's co-applicant at the PSC] from applying directly for a need determination would violate the dormant Commerce Clause of the United States Constitution because such action would unconstitutionally discriminate against out-of-state commerce and burden interstate commerce." *Id.* at 433. The Florida Supreme Court rejected the merits of the federal statutory and constitutional claims. The Florida court

held that "We find no merit in the constitutional arguments advanced by New Smyrna [i.e., Petitioner]." *Id.* at 433. With regard to the federal statutory claims, the Florida court held that "power-plant siting and need determination are areas that Congress has expressly left to the states." *Id.* Because the federal issues were expressly raised and decided on the merits, the judgment below is "final" for purposes of this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 8, clause 3 of the United States Constitution provides:

> The Congress shall have power
>
> * * *
>
> To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes; . . .

Article VI, clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Pursuant to this Court's Rule 14.1(f), the relevant provisions of the Energy Policy Act of 1992 are included as Appendix D (97a). Also pursuant to Rule 14.1(f), relevant portions of Order 888 of the Federal Energy Regulatory Commission, implementing the Energy Policy Act, ("Order 888") are included as Appendix E (103a).

Section 403.519, Florida Statutes provides in pertinent part:

> **403.519 Exclusive forum for determination of need.**—On request by an applicant or on its own motion, the commission shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act. . . . The commission shall be the sole forum for the determination of this matter, which accordingly shall not be raised in any other forum or in the review of proceedings in such other forum. In making its determination, the commission shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. The commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant and other matters within its jurisdiction which it deems relevant.[1]

Section 403.506(1), Florida Statutes, provides in pertinent part:

> The provisions of this act shall apply to any electrical power plant as defined herein, except that the provisions of this act shall not apply to any electrical power plant or steam generating plant of less than 75 megawatts in capacity . . . . No construction of any new electrical power plant . . . may be undertaken after October 1,

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[1] An "applicant" is defined as "any electric utility which applies for certification pursuant to the provisions of [the Siting Act]." § 403.503(4), Fla. Stat. In turn, "electric utility" is defined in Section 403.503(13), Florida Statutes, as follows:

> "Electric utility" means cities and towns, counties, public utility districts, regulated electric companies, electric cooperatives, and joint operating agencies, or combinations thereof, engaged in, or authorized to engage in, the business of generating, transmitting, or distributing electric energy.

> 1973, without first obtaining certification in the manner as herein provided . . . .

Section 403.507(2)(a)2., Florida Statutes, provides in pertinent part:

> The Public Service Commission shall prepare a report as to the present and future need for the electrical generating capacity to be supplied by the proposed electrical power plant. The report shall include the commission's determination pursuant to s. 403.519 and may include the commission's comments with respect to any other matters within its jurisdiction.

Section 403.507(3), Florida Statutes, provides in pertinent part:

> A certification hearing shall be held by the designated administrative law judge no later than 300 days after the complete application is filed with the [Florida Department of Environmental Protection]; however, an affirmative determination of need by the Public Service Commission pursuant to s. 403.519 shall be a condition precedent to the conduct of the certification hearing.

STATEMENT OF THE CASE

This case involves the attempt by one state to exclude from participation in interstate commerce—specifically, from commerce in the wholesale market for electricity—all entities other than (a) in-state utilities that provide retail electric service within that state's borders and (b) entities that enter into contracts with such in-state utilities.

This attempt was manifested in an unconstitutional, protectionist interpretation of Florida law that is the central holding of the decision below by the Florida Supreme Court. In that decision, the Florida court overturned an order of the PSC granting a determination of need for an electrical power plant to Petitioner New Smyrna Beach and its co-applicant, Duke Energy New Smyrna Beach Power Company Ltd.,

L.L.P. ("Duke"), an Exempt Wholesale Generator ("EWG") under the Energy Policy Act.[2] The determination of need is analogous to a certificate of public convenience and necessity and is a prerequisite for obtaining the necessary state permits to construct and operate the power plant. Duke was to furnish approximately seven percent of the power plant's output to New Smyrna Beach at wholesale and planned to sell the balance of the plant's output at wholesale in interstate commerce pursuant to Duke's tariff approved by the Federal Energy Regulatory Commission ("FERC"). The Florida Supreme Court reversed the PSC's order, holding that the PSC exceeded its statutory authority in granting a determination of need because the proposed power plant's output was "not fully committed to use by Florida customers who purchase electrical power at retail rates." *Garcia*, 767 So.2d at 435.

The Florida court's opinion rests on the belief that the Florida Legislature has the authority to restrict the construction and operation of electrical power plants in Florida to in-state retail-serving utilities and to entities that contract to sell their output to such in-state utilities. The opinion thereby prohibits potential power suppliers who do not provide retail service in Florida from building and operating power plants to compete with in-state retail-serving utilities to provide cleaner and less expensive power to Florida or out-of-state utilities in the competitive interstate wholesale power market.[3] It is inescapable that the Florida court's

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[2] The PSC acted under authority granted by the Florida Electrical Power Plant Siting Act, Sections 403.501-.518, Florida Statutes (the "Siting Act") and the PSC's determination of need statute, Section 403.519, Florida Statutes.

[3] Electric power transactions at wholesale are transactions in interstate commerce, subject to regulation by the Federal Energy Regulatory Commission. *See Federal Power Comm'n v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972) (Federal Power Commission, the precursor of the FERC, held to have jurisdiction over the transmission of power, at

interpretation—authorizing the permitting of power plants only to serve retail customers within Florida—would prohibit the use of Florida's resources by power producers seeking to compete with vertically integrated Florida utilities[4] in the interstate wholesale power market.[5]

The immediate result of the Florida court's opinion, if allowed to stand, will be higher electricity costs for New Smyrna Beach and for other utility systems inside and outside Florida that are denied the opportunity to purchase electricity from wholesale electricity providers like Duke.

A. FACTS

New Smyrna Beach is a municipal electric utility that provides service to approximately 20,000 retail customers within its service area on the upper east coast of Florida. Historically, New Smyrna Beach has purchased, at wholesale, most of the electricity that it sells to its retail customers from Florida Power & Light Co. ("FPL"), Florida Power Corp. ("FPC"), and Tampa Electric Co. ("TECO"). Duke is a Delaware limited partnership authorized to engage in the production and sale of electricity at wholesale in interstate commerce by its FERC-approved Rate Schedule No. 1. *Duke Energy New Smyrna Beach Power Company Ltd., L.L.P.*, 83 FERC ¶ 61,316 (June 25, 1998). Duke is also certified as an Exempt Wholesale Generator by the FERC pursuant to the

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wholesale, by utility over another utility's lines on the ground that the electrical energy thus transmitted "commingled" in interstate commerce); *see also* 16 U.S.C.S. §§ 824(a) & (b)(1) (1994).

[4] Vertically integrated utilities are those that engage in the generation (production), transmission, and distribution of electricity. Because they own and control facilities at all levels of utility operations, such vertically integrated utilities have incentives to favor their own generation for use on their transmission and distribution facilities.

[5] The record below showed that New Smyrna Beach and Duke had duly followed all applicable environmental permitting and siting requirements for the Project.

Energy Policy Act. *Duke Energy New Smyrna Beach Power Company Ltd., L.L.P.*, 83 FERC ¶ 62,220 (June 9, 1998); *see* 15 U.S.C. § 79z-5a (1998).

In order to secure the benefits of lower electricity costs through increased wholesale competition, New Smyrna Beach joined with Duke for the purpose of constructing and operating a state-of-the-art, natural gas fired electrical power plant having 514 MW of nominal generating capacity. This proposed electrical power plant is known as the New Smyrna Beach Power Project ("Project"). Because of the Project's size and technology, the Siting Act required New Smyrna Beach and Duke, as joint applicants, to obtain permits for the Project pursuant to that Act. As a required part of this permitting scheme, New Smyrna Beach and Duke sought and obtained the PSC's determination of need for the Project. 99 FPSC 3:401. Among other things, the PSC found the following: (1) that New Smyrna Beach needs the Project for system reliability and for cost-effective power supply; (2) that the Project will provide benefits to Peninsular Florida's operating reliability; (3) that Duke would be a wholesale provider of electricity, from whom retail-serving utilities may elect to purchase electricity when economic to do so; and (4) that the Project will "exert a downward pressure on electricity pricing in the wholesale power market in Florida," which would, "in turn, [] flow through to retail IOU customers in retail rates . . ."[6] 99 FPSC 3: 432-33, 435, 438.

The respondents here are three incumbent, in-state, investor-owned, retail-serving utilities, TECO, FPL, and FPC (collectively "Respondents"). In the proceeding before the PSC, the Respondents opposed the Project on factual grounds and on the ground that the PSC lacked jurisdiction to grant the required determination of need for the Project because of its predominantly wholesale character. The PSC held in favor

[6] "IOU" is the common abbreviation for "investor-owned utility," meaning utilities owned by stockholders, such as FPL, FPC, and TECO.

of New Smyrna Beach and Duke on the factual issues and likewise held that, under the plain language of the applicable Florida statutes, the PSC had jurisdiction to issue a determination of need.

B. PROCEEDINGS BEFORE THE PSC; THE FEDERAL QUESTIONS

The primary case below was a proceeding before the PSC to determine whether the Project was needed pursuant to Sections 403.519 and 403.507(2)(a)2., Florida Statutes. Based on an extensive factual record and extensive briefing and oral argument, the PSC granted the requested determination of need for the Project.

New Smyrna Beach raised both the preemption and Commerce Clause issues before the PSC. The PSC found that it was not appropriate to reach a decision on the Commerce Clause issue because there was insufficient evidence in the record to fully adjudicate it (apparently referring to undue burden analysis) and that it did not have to reach a definitive conclusion on the preemption issue because the PSC's decision could be made by construing Florida's existing statutory and regulatory framework without resort to a finding of federal preemption. 99 FPSC 3:424.

C. THE DECISION BELOW

The Respondents appealed to the Florida Supreme Court, asserting that the PSC had erred in granting the requested determination of need because it lacked statutory authority to do so, and also that the PSC had erred on factual grounds in issuing its order. New Smyrna Beach responded that the PSC had an adequate factual evidentiary record to support its order and that the PSC had adequate state statutory authority to grant its order; New Smyrna Beach also presented to the Florida court the federal issues upon which this Petition is grounded. The Florida court held that the PSC exceeded its statutory authority, stating as follows:

> [W]e find that the statutory scheme . . . was not intended to authorize the determination of need for a proposed power plant output that is not fully committed to use by Florida customers who purchase electrical power at retail rates.

Garcia, 767 So. 2d at 435. Because its ruling effectively barred Petitioner and its co-applicant from obtaining the permits for a wholesale merchant power plant in Florida, the Florida Supreme Court was forced to confront the federal issues that the PSC avoided. After reviewing New Smyrna Beach's extensive arguments concerning these federal issues, the Florida court rejected New Smyrna Beach's preemption and Commerce Clause arguments in two sentences:

> We find no merit in the constitutional arguments advanced by New Smyrna. As to any alleged preemption or interference with interstate commerce, we find that power-plant siting and need determination are areas that Congress has expressly left to the states.

Id. at 436 (footnote omitted).

The Florida court likewise rejected motions for rehearing submitted by the PSC, New Smyrna Beach, and Duke.

REASONS FOR GRANTING THE PETITION

The Florida court's opinion attempting to reserve the use of Florida's resources for the purpose of participating in the electricity industry *exclusively* to the favored class of in-state retail utilities raises fundamental questions under the Commerce and Supremacy Clauses of the United States Constitution. Specifically, the Florida court's opinion directly undermines a fundamental objective of Title VII of the Energy Policy Act. Moreover, the Florida court's opinion is diametrically opposed to the fundamental principles and values underlying the Commerce Clause as articulated in numerous opinions of this Court. This Court's review of the Florida Supreme Court's decision is therefore warranted

because the Florida Court "decided an important federal question that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Also, this case raises issues relating to the strict application of state need determination requirements to what federal law has designated as a free, competitive market for wholesale power generation. These issues have never been specifically addressed by this Court. Therefore review is also warranted because the Florida Supreme Court "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

Allowing the Florida court's opinion to stand will frustrate the will of Congress as articulated through the Energy Policy Act, and would lead to exactly the sort of chauvinism, isolationism, and protectionism by the states that the Commerce Clause was designed to prevent. In contravention of the Energy Policy Act, the Florida court's decision would empower the vertically integrated in-state utilities to use their retail monopoly to severely limit—or completely foreclose—competition in the wholesale power market. Moreover, the Florida court's opinion effectively gives in-state utilities "gatekeeper" authority to prevent Exempt Wholesale Generators, created by Congress to enhance competition in the interstate wholesale power market, from building plants in Florida. Giving this power to the incumbent, vertically integrated utilities directly undermines Congress's carefully crafted system, established in the Energy Policy Act, for preventing such utilities from thwarting competition in the wholesale power market.

The Florida court's opinion would allow Florida to restrict access to its natural resources—for use in interstate commerce—only to the favored class of in-state, retail-serving utilities. Other states would be permitted, if not encouraged, to similarly restrict the use of their resources in order to prevent the construction and operation of power plants that would operate in interstate commerce in order to

reserve their environmental resources for their residents, resident businesses, and incumbent, in-state utilities. The Florida court's opinion is thus unconstitutional under the Commerce Clause of the United States Constitution. *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982); *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

I. REVIEW IS WARRANTED BECAUSE FEDERAL LAW PREEMPTS THE STATE FROM REQUIRING A WHOLESALE POWER SUPPLIER TO OBTAIN A CONTRACT WITH AN IN-STATE UTILITY IN ORDER TO BUILD A COMPETITIVE WHOLESALE POWER PLANT.

The Florida court's interpretation limiting applicants for a need determination to electric utilities that provide retail power in-state is inconsistent with the goals and policies of federal law intended to promote competition in the United States electric utility industry. The Energy Policy Act of 1992 and FERC's Order 888 require public utilities that own transmission facilities to provide access to those facilities to independent power generators on a non-discriminatory basis. The Energy Policy Act also created EWGs to promote competition in the interstate wholesale power market. The Florida court's construction would require that Duke contract to sell power to an in-state utility before it can construct and operate the Project,[7] which would undermine a fundamental

[7] Certain limited classes of special-purpose power plants, including those using non-steam and non-solar technologies and small plants using steam or solar technologies, may be permitted and constructed outside the Siting Act. The existence of this opportunity to construct power plants that fall within these limited categories does not affect Petitioner's federal arguments, because the Florida court's opinion categorically forecloses access to the required permitting processes—and thus to Florida's resources—for the larger, cleaner, and more efficient power plants, like

objective of Title VII of the Energy Policy Act and Order 888, *i.e.*, to prevent vertically integrated public utilities from interfering with the development of a competitive wholesale power market. Thus both the Energy Policy Act and Order 888 preempt the Florida court's construction of Section 403.519, Florida Statutes.

The doctrine of federal preemption derives from the affirmative grant of powers to Congress and the Supremacy Clause of the United States Constitution. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Independent Energy Producers Ass'n, Inc. v. California Pub. Util. Comm'n*, 36 F.3d 848, 853 (9th Cir. 1994). As long as Congress acts within its constitutional powers, its statutes take precedence over any state law that conflicts with them. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1,210 (1824). By the same reasoning, state laws must also yield to duly promulgated federal regulations with which they conflict. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986); *Hillsborough County, Fla. v. Automated Med Labs*, 471 U.S. 707, 713 (1985); *Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153-54 (1982). State law need not require conduct that would violate federal law; it is sufficient that state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n.*, 461 U.S. 190, 204 (1983) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

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the Project in question here, that are best suited to participating in the competitive wholesale interstate power market.

A. Review Is Warranted Because Requiring Wholesale Utilities To Contract With An In-State Utility In Order To Build Power Plants Conflicts With The Goal Of The Energy Policy Act And Order 888 To Prevent Discrimination By Vertically Integrated Utilities.

Federal preemption may be explicit, may result from a conflict between federal and state law, or may arise when the federal regulatory provisions evidence an intent by Congress to occupy the field within which the state regulates. *Cipollone*, 505 U.S. at 516. The Florida Supreme Court's interpretation of Section 403.519, Florida Statutes, would allow incumbent utilities to frustrate completely the Congressional objective of developing an open and competitive wholesale power market. Requiring a wholesale power supplier to contract with an in-state utility as a prerequisite to being allowed to build a power plant intended to supply power to the interstate wholesale market directly and substantially undermines the purposes of Title VII of the Energy Policy Act. That purpose is to prevent vertically integrated, state-regulated utilities from discouraging federally regulated public utilities, such as Duke, from building wholesale generating facilities. *See* Energy Policy Act of 1992, Pub. L. 102-486, 106 Stat. 2776, 2905-21 (1992).

The Energy Policy Act was written against a background of FERC's difficulty in unbundling generation of electricity and creating a competitive market for wholesale power. When Congress enacted the Federal Power Act, electricity was provided almost exclusively by vertically integrated state-regulated utilities which owned generation, transmission and distribution facilities. Order 888, 61 Fed. Reg. 21,539, 21,543 (1992). Utilities sold a bundled service—delivered electric energy—to retail and wholesale customers. *Id.* Recent changes in technology, and the experience of utilities

with buying power from independent qualifying facilities under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified as amended at 16 U.S.C. §§ 2601-2645 (1994)), indicated that generation of electricity could be provided more economically by independent producers, operating in a competitive market, without forfeiting system reliability. *Id.* at 21,543-46.

FERC, however, was limited in its ability to encourage development of independent wholesale generators by two major factors. First, FERC did not have clear authority to order vertically integrated utilities to transmit power for wholesale generators. *Id.* at 21,546. Thus, existing utilities could stymie the plans of wholesale public utilities by refusing to transmit power for them, which would isolate their generating facilities and render them incapable of delivering their power. Second, and of particular significance here, the Public Utility Holding Company Act of 1935 ("PUHCA") imposed severe restrictions on the ability of independent developers to own power projects that were not qualifying facilities under PURPA, and prohibited utilities from owning such facilities outside of the geographic area in which they provide regulated service. Title VII of the Energy Policy Act was adopted to grant FERC authority to address both of these problems.

In the Energy Policy Act's amendments to Sections 211 & 212 of the Federal Power Act, Congress granted FERC the authority to order utilities to transmit power for other generators of electricity. *See* 16 U.S.C. §§ 824j, 824k (1998). The legislative history manifests that Congress's intent in so providing was to prevent utilities with monopoly power over power transmission from interfering with FERC's efforts to create a competitive market for wholesale power. The House Report on the Energy Policy Act stated:

> Absent clarification of FERC wheeling authority, it can be expected that some utilities will try to exercise their monopoly power to block IPP's and others' legitimate transmission requests. This would permit unlawful discrimination to thwart efficiency in the electricity industry, and would defeat the Commission's [FERC's] goal of encouraging low rates for consumers through greater competition.

H.R. Rep. No. 102-474(I) at 139-40 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1954, 1962-63.

FERC's Order 888 also evidences a central concern with the ability of utilities to interfere with the development of a competitive wholesale power market. In the introduction and summary on the very first page of Order 888, FERC stated that, in order for consumers to see the benefits from a competitive electricity market:

> we [FERC] must . . . ensure that all these [owners of transmission facilities] . . . cannot use monopoly power . . . to unduly discriminate against others [i.e., competing generators].

Order 888, 61 Fed. Reg. at 21,541. The Florida court's interpretation of Section 403.519, Florida Statutes, would give in-state utilities the precise power that Congress and FERC carefully worked to eliminate. Under that reading, because Florida's retail utilities cannot be forced to sign contracts for purchases of power from wholesale utilities like Duke, 99 FPSC 3:437-38, the in-state retail utilities retain the power to act as "gatekeepers" and prevent such wholesale utilities from building generating facilities at all. Transmission guaranteed by the Energy Policy Act is not worth anything if a wholesale utility cannot build a plant to generate power in the first place.

B. Review Is Warranted Because Requiring Wholesale Utilities To Enter Into Contracts With In-State Utilities Undermines The Energy Policy Act's Goal Of Facilitating Provision Of Wholesale Power By Experienced, Competitive Power Producers.

Requiring that wholesale utilities, like Duke, enter into contracts with in-state retail utilities before applying for a determination of need would also undermine the purpose of the Energy Policy Act to provide for wholesale public utilities, such as Duke, to be exempted from the requirements of PUHCA. Prior to the Energy Policy Act, PUHCA greatly restricted the structure of, and limited utility investment in, affiliated wholesale utilities like Duke. PUHCA subjected any such producer that was affiliated with a utility to onerous regulation by the Securities Exchange Commission. *See generally* 15 U.S.C. §§79a-79z-6 (1998). The legislative history of the Energy Policy Act demonstrates that Congress was especially concerned that PUHCA would discourage experienced power producers from building generating facilities. *See* H.R. Rep. No. 102-474(I) at 139 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1954, 1962. Thus, in adopting section 711 of the Energy Policy Act, 15 U.S.C. §79z-5a (1998), Congress created a new entity relative to PUHCA, the "Exempt Wholesale Generator" or "EWG", specifically to allow companies like Duke to use their expertise to develop and operate competitive wholesale generating facilities. Construing Florida law to allow existing in-state retail utilities to veto the building of power plants by affiliates of out-of-state utilities directly interferes with Congress' objective to allow experienced companies to build and operate wholesale generating facilities.

Congressional intent that states not be allowed to burden the building of EWG facilities dispositively preempts the states from imposing such burdens. *See California Savings &*

Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987) (stating that the Court's role in preemption cases is to ascertain the intent of Congress). When Congress passed the Energy Policy Act, it fully recognized that the Act would affect the criteria that states historically considered in approving a state-regulated utility's construction of power generation facilities. The Energy Policy Act explicitly allows the states to retain jurisdiction to guard against environmental harm that building a plant might entail, and to determine siting issues raised by an application to build such a plant.

C. The Energy Policy Act Provision Clarifying That The Act Does Not Affect State Authority Relating To Environmental Protection Or Siting Of Generation Facilities Does Not Authorize The Florida Supreme Court's Interpretation Of The State's Need Determination Statute.

The Florida Supreme Court dismissed contentions that its interpretation of the state need determination statute was inconsistent with both the Commerce Clause and the Energy Policy Act because that Act explicitly reserves to states continued jurisdiction to regulate the environmental impacts and siting of merchant plants. *See Garcia*, 767 So. 2d at 436; 15 U.S.C. §79 note (1998). In essence, the Florida Supreme Court concluded that a need determination is part of the environmental assessment of a proposed power plant, which the Energy Policy Act explicitly left within states' authority. This conclusion hinges on the assumption that one cannot assess environmental impact without balancing it against need. But the structure of the Siting Act belies this assumption.

The determination of need is *not* part of the balancing of environmental impact; it is a *precondition* for an applicant being allowed to present evidence about the environmental impact of its project to the Siting Board. *See* § 403.507(3),

Fla. Stat. No matter how environmentally beneficial a proposed wholesale merchant plant may be, and no matter how consistent the plant would be with surrounding land uses, under the Florida court's interpretation, the plant will never be considered by the state Siting Board unless the applicant is first able to show that there is demand in Florida for the plant's power, a showing that merchant plants who do not contract with Florida retail utilities are never even given an opportunity to make. The Florida court's application of need determinations to merchant plants serves no purpose other than to insulate incumbent, in-state retail utilities from competition in the wholesale power market. The Energy Policy Act provision regarding state authority over environmental and siting matters was never intended to allow states to discriminate against out-of-state applicants or to interfere with the fundamental operation of a competitive interstate wholesale power market.

II. REVIEW IS WARRANTED BECAUSE THE FLORIDA SUPREME COURT'S INTERPRETATION OF FLORIDA LAW VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The Commerce Clause of the United States Constitution prohibits any state from discriminating against or unnecessarily burdening interstate commerce. Under the Florida Supreme Court's interpretation of state statutes governing the permitting of new electrical generation facilities in the state, wholesale power suppliers like Duke may construct and operate a merchant power plant in Florida *only* if it first contracts with an in-state retail utility, which (according to the Florida Supreme Court) is the only type of entity entitled to apply to the PSC for a determination of need. The exclusionary effect of this interpretation is clear from the face of the Florida Supreme Court's opinion: "A determination of need is presently available only to an

applicant that has demonstrated that a utility or utilities serving retail customers has specific committed need for all the electrical power to be generated at a proposed plant." *Garcia*, 767 So.2d at 434.

This interpretation interferes with interstate commerce on two levels. First, a company proposing to build a merchant plant in Florida cannot sell some of that power to users in other states because the PSC may not grant a "determination of need for a proposed power plant output that is not fully committed to use by Florida customers." *Id.* at 435. Second, even if a company entering the wholesale power market in Florida agrees to sell all the electrical power generated by a proposed merchant power plant to buyers within Florida, it still may not obtain the required determination of need unless it first agrees to sell that power to existing in-state retail utilities. Under the Florida Supreme Court's interpretation of Florida law, it is therefore impossible for any out-of-state entity to enter the wholesale market for electrical power in Florida without first obtaining the permission of a potential in-state competitor—regardless of where the power eventually will be sold.

This interpretation of Florida law gives existing in-state utilities unconstrained authority under state law to block new entrants to the Florida wholesale electrical power market, which in turn ensures that in-state utilities will maintain a *total monopoly* on all wholesale electrical power generation within the state. Existing in-state utilities may bar out-of-state companies from competing in the Florida market simply by refusing to apply for a determination of need on behalf of an out-of-state corporation. Or, conversely, in-state utilities can demand from new market entrants economic benefits to which the in-state utilities would not otherwise be entitled in exchange for presenting an out-of-state company's determination of need application to the PSC. Each of these alternatives distorts the market, establishes a legal regime that

clearly favors local corporations, and is therefore inconsistent with the basic Commerce Clause principle that no state may use its regulatory authority to isolate its own corporations from interstate competition.

The dormant (or "negative") Commerce Clause doctrine imposes a judicially enforceable limit on the extent to which a state may regulate commerce coming into or leaving that state. The dormant Commerce Clause limit on state regulatory authority is drawn directly from the Constitution, and therefore applies even in the absence of any federal statute preempting a particular state regulation. "[A]ny state regulation of interstate commerce is subject to scrutiny under the dormant Commerce Clause, unless such regulation has been preempted or expressly authorized by Congress." *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3d 701, 710 (3rd Cir. 1995).

The dormant Commerce Clause creates a national economic marketplace in every commercial commodity, including electricity. *See New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982)(striking down as a violation of the dormant Commerce Clause a New Hampshire Public Utilities Commission order banning the export of locally produced hydroelectric power). The principle governing dormant Commerce Clause cases is simple and virtually absolute: "This 'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74 (1988). Any state statute or regulation that functions primarily to provide economic benefits to in-state corporations is therefore unconstitutional. "This Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either

into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety." *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 535 (1949). In this case, New Smyrna Beach does not challenge the Florida health, safety, and environmental laws applicable to power generation facilities, and New Smyrna Beach (and Duke) intend to comply with these laws in every respect. Indeed, New Smyrna Beach and Duke followed all applicable permitting requirements for the Project until the Florida court's decision stopped them. But an interpretation of Florida law that prohibits wholesale utilities like Duke from *even applying* for a determination of need without first contracting with an in-state utility is related to neither health, safety, nor the environment; it is pure economic protectionism, and therefore is prohibited by the dormant Commerce Clause.

State laws can conflict with dormant Commerce Clause mandates in two ways: by discriminating against out-of-state commerce, and by unreasonably burdening interstate commerce. The exclusionary interpretation of Florida law adopted by the Florida Supreme Court is unconstitutional under both categories of dormant Commerce Clause jurisprudence.

A. The Florida Supreme Court's Interpretation Of Florida Law Discriminates Against Out-Of-State Commerce.

Requiring out-of-state wholesale power suppliers to contract with an in-state utility before obtaining a determination of need overtly discriminates against *unaffiliated* out-of-state companies seeking to enter the wholesale market for electrical energy in Florida. State laws that overtly discriminate against out-of-state competitors of in-state companies are virtually impossible to justify under the Commerce Clause. "[W]here simple economic protectionism

is effected by state legislation, a virtually per se rule of invalidity has been erected." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Under the Florida Supreme Court's exclusionary interpretation of Florida law, out-of-state companies who refuse to enter into binding contracts with in-state utilities are totally barred from obtaining a determination of need, and therefore are totally barred from doing business in Florida as wholesale producers of electrical power. This interpretation of Florida law fits precisely this Court's description of a clear dormant Commerce Clause violation. "The clearest example of [protectionist] legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." *Id.* at 624.

This Court has held unconstitutional many examples of state regulations that have attempted to give local economic interests a competitive advantage by requiring anyone doing business in the state to channel part of their business to the local companies. *See C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994)(striking down a local ordinance barring local waste recycler from shipping nonrecyclable waste to out-of-state processor); *Wyoming v. Oklahoma*, 502 U.S. 437 (1992)(striking down a state statute requiring utilities to buy designated percentage of local coal); *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984)(striking down a state statute requiring companies exporting timber from Alaska to process timber at local processing plants); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)(striking down a state statute requiring shippers to package cantaloupes in Arizona before being shipped out of state); *Toomer v. Witsell*, 334 U.S. 385 (1948)(striking down a state statute requiring shrimp fishermen to unload, pack, and stamp shrimp in South Carolina before shipping them out of state); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928) (striking down a state statute requiring shrimp to be hulled in Louisiana before being shipped out of state).

Although these cases extend over seven decades, and involve many different industries, the underlying theme is consistent: neither a state nor one of its agencies may discriminate against interstate commerce, regardless of whether the discrimination takes the form of a direct ban on out-of-state competitors, a statutory requirement that out-of-state businesses join with in-state businesses before doing business within the state, or the selective application of otherwise legitimate certification requirements. This theme has been applied to cases analogous to the present one for many years. For example, denying competitive wholesale utilities like Duke applicant status or requiring such wholesale utilities to contract with an in-state utility for the full output of the proposed power plant to obtain a determination of need would be indistinguishable from an equally exclusionary certification requirement struck down over seventy years ago in *Buck v. Kuykendall*, 267 U.S. 307 (1925). In that case, the State of Washington required all common carriers using the state's highways over certain routes to obtain a certificate of public convenience and necessity. *Id.* at 313. Although the applicant had received a similar certificate from Oregon, and asserted his willingness to comply with all applicable Washington state regulations concerning common carriers, Washington denied the certificate on the ground that the route was already being adequately served. *Id.* In an opinion by Justice Brandeis, the Supreme Court struck down the certification requirement. The Court noted that the purpose of the requirement "is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines, not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons, while permitting it to others for the same purpose and in the same manner." *Id.* at 315-16.

The Supreme Court has recently reaffirmed *Buck* as an example of unlawful state discrimination against interstate

commerce. *See Carbone*, 511 U.S. at 394; *see also Medigen of Kentucky, Inc. v. Public Service Comm'n of West Virginia*, 985 F.2d 164, 167 (4th Cir. 1993) (striking down a state's requirement that a transporter of medical waste obtain a certificate of convenience and necessity, and noting that "West Virginia's goal of providing universal service at reasonable rates may well be a legitimate state purpose, but restricting market entry does not serve that purpose"). Moreover, excluding wholesale utilities like Duke from the determination of need process would interfere with interstate commerce even more directly than the certification requirement struck down in *Buck*, because in this case, such wholesale utilities would be prohibited from even applying for a determination of need unless they contract with in-state retail utilities for the full output of the Project. Thus, in the absence of an agreement with an existing Florida utility, such utilities would be entirely barred even from asking the Commission for permission to enter the Florida wholesale market.

It is irrelevant for purposes of dormant Commerce Clause analysis that wholesale utilities like Duke could eventually enter the Florida market *after* contracting with an in-state utility to obtain a determination of need. Any discriminatory state action that is intended or that has the effect of protecting local interests is sufficient to trigger the application of the Commerce Clause, even if that action merely imposes extra costs on an out-of-state entity. "The volume of commerce affected [by an exclusionary state regulation] measures only the extent of the discrimination; it is of no relevance to the determination whether a State has discriminated against interstate commerce." *Wyoming*, 502 U.S. at 455. Thus, even a minor economic effect on the operation of out-of-state wholesale utilities would constitute a violation of the dormant Commerce Clause if that effect tends to favor local economic interests. Such an effect is inevitable if wholesale utilities are forced to contract with in-state utilities to apply for a determination of need on their behalf. The requirement that

such utilities enter contracts that might not be economically advantageous for them would itself constitute an impermissible impact on interstate commerce. At a minimum, in-state utilities are not likely to undertake the task of applying for a determination of need on behalf of wholesale utilities like Duke without demanding some compensation in return. Thus, a wholesale utility like Duke would be forced to compensate the in-state utility for its assistance, and this compensation would necessarily raise the cost of providing power to the wholesale market. In-state utilities who could themselves apply for a determination of need would therefore obtain an economic advantage over out-of-state competitors such as Duke in serving the market for wholesale electrical power. This Court has consistently held that the dormant Commerce Clause prohibits states from using their regulatory authority in this way to skew a particular economic market in favor of local interests.

No local policy interest supports the Florida Supreme Court's exclusionary interpretation of Florida law other than the policy of providing Florida retail utilities a monopoly over wholesale electrical power generation. This interest directly conflicts with the most basic precepts of this Court's Commerce Clause jurisprudence. As noted above, it is virtually impossible to justify discriminatory restrictions on interstate commerce. *See Philadelphia*, 437 U.S. at 624 (noting "a virtually per se rule of invalidity" for protectionist statutes). Such restrictions may not be justified under any circumstance if the state cannot demonstrate that its legitimate local interests could not be protected through a nondiscriminatory alternative regulatory scheme. "Discrimination against interstate commerce in favor of local business or investment is per se invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Carbone*, 511 U.S. at 392. The legitimate interests served by the Florida need determination statute—

ensuring reliability and adequate cost-effective power—can be more than adequately served by allowing wholesale utilities, like Duke, to apply directly to the PSC without first contracting with in-state utilities for the entire capacity of their plants. Since protecting the economic interests of in-state retail utilities is the only possible interest served by the Florida Supreme Court's interpretation of the Florida need determination statute, that interpretation is per se invalid.

Finally, the fact that the Florida Supreme Court's interpretation of the Florida need determination process might hypothetically affect in-state wholesale utilities as well as out-of-state wholesale utilities such as Duke does not cure the unconstitutional discrimination inherent in the interpretation. This Court has held repeatedly that a discriminatory statute "is no less discriminatory because in-state or in-town [companies] are also covered by the prohibition." *Carbone*, 511 U.S. at 391; *see also Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992)(striking down a Michigan landfill regulation, even though the regulation disadvantaged some Michigan commerce as well as interstate commerce); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951)(striking down a Madison, Wisconsin ordinance requiring local inspection of milk, even though the ordinance affected milk imported from other parts of Wisconsin, as well as milk from other states). It is also irrelevant that the Florida court's interpretation does not disadvantage some out-of-state companies, in the sense that some out-of-state companies may choose voluntarily to join with an in-state utility to seek a determination of need for a new merchant power plant. "[T]he mere fact that not all out-of-state competitors are disadvantaged by a state statute does not preclude a finding that the statute places a discriminatory burden on interstate commerce." *Division of Alcoholic Beverages and Tobacco, et al. v. McKesson Corp.*, 524 So.2d 1000, 1007 (Fla. 1988)(holding that protectionist excise tax violated dormant Commerce Clause, but refusing

to force state to refund unconstitutionally collected tax), *rev'd in part*, 496 U.S. 18 (1990)(requiring state to refund unconstitutionally collected tax).

In sum, it is impossible under longstanding dormant Commerce Clause precedents to justify the requirement that wholesale utilities like Duke contract with a Florida utility before applying for a determination of need: The requirement overtly discriminates in favor of existing Florida utilities, it has no legitimate justification that cannot be satisfied by nondiscriminatory means, and it cannot be justified on the ground that other Florida independent power producers might also be affected by the requirement. The only possible conclusion, therefore, is that the Florida Supreme Court's exclusionary interpretation of Section 403.519, Florida Statutes, constitutes unconstitutional discrimination in violation of the dormant Commerce Clause, and Duke with its co-applicant New Smyrna Beach should be permitted to apply directly for a determination of need for the Project.

B. The Florida Supreme Court Ruling Impermissibly Burdens Interstate Commerce.

Because the requirement that wholesale utilities like Duke contract with an in-state utility before applying for a determination of need constitutes unconstitutional discrimination against interstate commerce, it is unnecessary to consider whether the requirement would unconstitutionally burden interstate commerce. *See Carbone*, 511 U.S. at 390 (holding that courts "need not resort to" burden category of dormant commerce clause analysis if statute is found to discriminate against interstate commerce). In this case, however, applying the burden category of dormant Commerce Clause analysis would produce the same result as the discrimination analysis: *i.e.*, that the Florida Supreme Court's interpretation of Section 403.519, Florida Statutes, is unconstitutional.

This second category of dormant Commerce Clause analysis limits the extent to which states can indirectly burden interstate commerce, even if there is no evidence of local favoritism or discrimination against interstate commerce. The most frequently cited statement of the burden analysis is found in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. . . . And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

See also Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 579 (1986) ("we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.").

In this case the Florida Supreme Court's interpretation of Florida law fails every aspect of the *Pike* burden test. Requiring wholesale suppliers to contract with in-state retail utilities before applying for a determination of need is not evenhanded, the requirement's effect on interstate commerce is not incidental, the burden on commerce outweighs the putative local benefits, and the legitimate local interests represented by the determination of need process can be protected through means that have a much lower impact on interstate activities.

The discussion in the previous section demonstrates why the Florida Supreme Court's interpretation of Section 403.519, Florida Statutes, is not evenhanded in its treatment

of in-state and out-of-state participants in the market for wholesale electrical power. Under the Florida Supreme Court's proposed interpretation, the only way an out-of-state company can enter the market for wholesale electrical power is by entering into a contract with an in-state utility to obtain the necessary determination of need. This imposes a major burden on commerce because it imposes additional costs on out-of-state applicants and forces them to give up a measure of control over the regulatory decisions that dictate how and when a new generation facility will be built.

The only legitimate interest that can be asserted in favor of the determination of need process for wholesale merchant plants is ensuring electric system reliability and integrity. *See* Fla. Stat. § 403.519. This interest can be satisfied by requiring the PSC to deal with such wholesale applicants directly instead of through a local intermediary. There is, of course, another possible interest to justify prohibiting out-of-state wholesale utilities from applying for a determination of need directly, *i.e.*, to protect local economic interests from out-of-state competition in the wholesale market for electricity. This interest constitutes pure economic protectionism, however, and is therefore inconsistent on its face with the dormant Commerce Clause. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 43-44 (1980).

Under the dormant Commerce Clause, the scope of a state's legitimate authority with regard to wholesale electrical generation facilities is necessarily more limited than its authority with regard to new generation facilities being proposed by in-state utilities subject to retail rate regulation. Thus, a decision to permit Duke and other wholesale power generators to apply directly for a determination of need would not imply any constitutional limit to the PSC's existing authority to regulate in-state retail utilities. The PSC's greater authority with regard to in-state retail utilities is consistent with the dormant Commerce Clause because it is necessary to protect the ratepayers who will be forced to bear

the cost and the risk of a local utility's power plants. This interest has been recognized in federal statutes that specifically grant states the authority to regulate retail utilities, while encouraging the development of a free market in wholesale merchant power plants. The states' interests in the regulation of retail utilities are simply not relevant to wholesale merchant utilities' applications because those wholesale utilities will assume the full cost and risk of the facility.

Permitting wholesale utilities to apply directly for a determination of need infringes on none of the state's legitimate regulatory interests. Conversely, requiring wholesale utilities like Duke to contract with an in-state utility to apply for a determination of need would directly burden interstate commerce in a manner that favors local economic interests and disadvantages competitors from outside the state. The burden this requirement imposes on interstate commerce clearly exceeds the local benefits; therefore the Florida Supreme Court's exclusionary interpretation of Section 403.519, Florida Statutes, is unconstitutional under the burden category of dormant Commerce Clause jurisprudence.

CONCLUSION

For the reasons set forth in this Petition, the writ of certiorari should be granted.

Respectfully submitted,

STEVEN G. GEY
Counsel of Record
MARK SEIDENFELD
FLORIDA STATE UNIVERSITY
College of Law
425 West Jefferson Street
Tallahassee, Florida 32306-1601
(850) 644-3400

ROBERT SCHEFFEL WRIGHT
JOHN T. LAVIA, III
LANDERS & PARSONS, P.A.
P.O. Box 271
Tallahassee, Florida 32302
(850) 681-0311

Counsel for Petitioner
Utilities Commission,
City of New Smyrna Beach, Florida

APPENDIX A

SUPREME COURT OF FLORIDA

Nos. SC95444; SC95445; SC95446

TAMPA ELECTRIC CO.; FLORIDA POWER CORP.; and FLORIDA POWER & LIGHT CO.,

Appellants,

vs.

JOE GARCIA, *et al.*, as the FLORIDA PUBLIC SERVICE COMMISSION; UTILITIES COMMISSION, CITY OF NEW SMYRNA BEACH; and DUKE ENERGY NEW SMYRNA BEACH POWER CO., LTD., LLP.,

Appellees.

[April 20, 2000]

[Rehearing Denied September 28, 2000]

REVISED OPINION

PER CURIAM.

These consolidated cases are before the Court on appeal from an order of the Public Service Commission (PSC or Commission). We have jurisdiction. Art. V, § 3(b)(2), Fla. Const. The issue presented concerns the statutory authority of the PSC to grant a determination of need under the Florida Electrical Power Plant Siting Act (Siting Act) [1] and the Florida Energy Efficiency & Conservation Act (FEECA) [2] for an electric power company's proposal to build and operate a

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[1] § 403.501-.518, Fla. Stat. (1997).

[2] §§ 366.80-.85, 403.519, Fla. Stat. (1997).

merchant plant in Volusia County.[3] We reverse the order of the PSC for the reasons stated herein.

The construction of any new electrical power generating plant as defined by section 403.503(12), Florida Statutes, that is not otherwise exempted by Florida law, is required to be certified in accord with the various requirements of the Siting Act in chapter 403, Florida Statutes.[4] As part of the process, an applicant seeks a determination of need from the PSC for a proposed power plant. *See* § 403.519, Fla. Stat. (1997).[5] The PSC's granting of a determination of need for a proposed. power plant creates a presumption of public need. *See* § 403.519, Fla. Stat. (1997). This determination serves as the

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[3] The PSC defines "merchant plant" as a power plant with no rate base and no captive retail customers.

[4] Section 403.506, Florida Statutes (1997), provides in relevant part:

> (1) The provisions of this act shall apply to any electrical power plant as defined herein, except that provisions of this act shall not apply to any electrical power plant or steam generating plant of less than 75 megawatts in capacity or to any substation to be constructed as part of an associated transmission line unless the applicant has elected to apply for certification of such plant or substation under this act.

[5] Section 403.519, Florida Statutes (1997), provides in relevant part:

> On request by an applicant or on its own motion, the commission shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act. . . . The commission shall be the sole forum for the determination of this matter, which accordingly shall not be raised in any other forum or in the review of proceedings in such other forum. In making its determination, the commission shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. The commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant and other matters within its jurisdiction which it deems relevant.

PSC's report required by section 403.507(2)(a)2, Florida Statutes (1997), as part of the permitting procedure.

On August 19, 1998, the Utilities Commission of the City of New Smyrna Beach (New Smyrna), and Duke Energy New Smyrna Beach Power Co., Ltd. (Duke) filed in the PSC a joint petition for determination of need for the New Smyrna Beach Power Project, a proposed natural gas fired combined cycle generating plant with 514 megawatts of net capacity to be built and operated by Duke in New Smyrna Beach. Duke is not presently subject to PSC regulation as a public utility authorized to generate and sell electric power at retail rates to Florida customers. Duke is a subsidiary of an investor-owned utility based in North Carolina. As a company offering electrical power for sale at wholesale rates, Duke is subject to the regulatory jurisdiction of the Federal Energy Regulatory Commission (FERC) and is classified as an exempt wholesale generator (EWG).[6] New Smyrna is a Florida municipal electric utility that directly serves retail customers.[7] In the present petition for determination of need, Duke proposed to build a 514-megawatt plant, with thirty megawatts of that capacity and associated energy committed to be sold to New Smyrna and the remaining megawatts uncommitted and intended to be made available for sale at competitive wholesale rates to utilities that directly serve retail customers.

Prior to filing the present joint petition, Duke and New Smyrna entered into an agreement requiring Duke to finance, design, build, own, and operate the plant and to sell to New Smyrna thirty megawatts of Duke's proposed plant's capacity at a discount wholesale rate. New Smyrna agreed to provide the site for the plant, a wastewater treatment facility, water, and tax reductions. New Smyrna intends to sell to its retail

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[6] *See* 15 U.S.C. § 79z-5a (1994).

[7] New Smyrna is regulated by the PSC pursuant to section 366.04(2), Florida Statutes (1997).

customers the energy it has committed to purchase from Duke. The agreement also provides that Duke will make available for sale the remaining 484 megawatts of power in the competitive wholesale electrical power market primarily, but not exclusively, for ultimate use in Florida.

The seven intervenors as to the petition included present appellants Tampa Electric Co. (Tampa Electric), Florida Power Corp. (FPC), and Florida Power & Light Co. (FP&L). After a hearing in December 1998, three members of the Commission voted to deny motions to dismiss by FPC and FP&L and voted to grant the joint petition. *In re Joint Petition for Determination of Need*, No. PSC-99-0535-FOF-EM (March 22, 1999) (Order). Commissioner Clark dissented, concluding that Duke was not a proper applicant. Commissioner Jacobs concurred and dissented, stating that he believed Duke was a proper applicant but that Duke had not proven its proposed plant to be the most cost-effective option.

In this appeal, appellants are public utilities that are regulated and authorized by the PSC to generate and sell electrical power to users of the power in Florida. Appellants designate themselves as Florida retail utilities. Appellants contend that section 403.519, Florida Statutes, from its initial adoption in 1980 through subsequent legislative changes and up to the present date, does not authorize the PSC to grant a determination of need to an entity other than a Florida retail utility regulated by the PSC whose petition is based upon a specified demonstrated need of Florida retail utilities for serving Florida power customers.

Appellants point out that the recent national movement toward the construction of power plants intended to generate power to be sold in competitive wholesale markets stems from recent federal legislative initiatives. This movement began with the Public Utilities Regulatory Policies Act of

1978 (PURPA).[8] Subsequent relevant federal legislation includes the Energy Policy Act of 1992,[9] which exempts certain wholesale generators from some regulatory requirements. Another milestone is a FERC order issued in 1996 which affects power distribution.[10] Appellants note that these federal initiatives occurred subsequent to the Legislature's enactment of the Siting Act of 1973. Appellants also emphasize that the Legislature has not amended section 403.519 to authorize the PSC to grant a determination of need for a power plant in Florida that would generate power intended to be sold in the competitive wholesale market which is developing as a result of these federal legislative and regulatory changes.

Appellants contend that Duke is not an authorized applicant under section 403.519 because Duke is not a Florida retail utility. Appellants contend that joining with New Smyrna, which is a proper applicant, does not cure the fact that Duke is not a proper applicant in view of the commitment to New Smyrna of just thirty megawatts of the 514-megawatt capacity of the plant.[11] Appellants contend that

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[8] Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified as amended at 16 U.S.C. §§ 2601-2645 (1994)). *See also* Jeffrey D. Watkiss & Douglas W. Smith, *The Energy Policy Act of 1992–A Watershed for Competition in the Wholesale Power Market*, 10 Yale J. on Reg. 447 (1993).

[9] Pub. L. 102-486, 106 Stat. 2776 (1992) (amending the Federal Power Act, codified at 16 U.S.C. §§ 791a-825u (1994)).

[10] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (1996), [Regs. Preambles Jan. 1991-June 1996] F.E.R.C. Stats. and Regs. 31,036, *clarified*, 76 F.E.R.C. 61,009 & 76 F.E.R.C. 61,347 (1996) (known as Order 888).

[11] New Smyrna's committed power purchase could be satisfied by a power plant that is exempt from obtaining a determination of need because a plant with a capacity of less than seventy-five megawatts is

the proposed plant is not authorized by section 403.519 because all but the thirty megawatts that New Smyrna has agreed to buy is uncommitted. Therefore, there is no demonstrated specific need committed to Florida customers who are intended to be served by this proposed plant.

In support of their position, appellants cite PSC orders in proceedings that led to this Court's decisions in *Nassau Power Corp. v. Beard*, 601 So. 2d 1175 (Fla. 1992) (*Nassau I*), and *Nassau Power Corp. v. Deason*, 641 So. 2d 396 (Fla. 1994) (*Nassau II*) (collectively, the *Nassau* cases).

In the proceedings below, the five members of the PSC were divided in their conclusions as to the decision to grant the determination of need. The three-member majority's rationale is presented by the PSC as an appellee in this Court. In the PSC order at issue here, the PSC majority finds that Duke and New Smyrna are proper applicants pursuant to the Siting Act, FEECA, and the Florida Administrative Code. Order at 18-29. The majority construes section 403.519 as requiring, pursuant to section 403.503(4), Florida Statutes (1997), that an applicant may be any "electric utility." *Id.* at 19. Utilities are defined in section 403.503(13), Florida Statutes (1997), as "regulated electric companies." *Id.* The majority finds that Duke is a regulated electric company pursuant to federal regulatory statutes because the statutes do not expressly provide that "regulated electric companies" are to be *state*-regulated. *Id.* at 20. The majority finds that even though Duke is not a Florida retail utility, it is a regulated electric company subject to federal regulation and certain other Florida regulation. *Id.* at 19, 22-24. The majority also finds that a determination of need properly could be based upon the projected needs of utilities throughout peninsular Florida rather than committed megawatt needs of specific retail utilities. *Id.* at 53-54. The majority finds the *Nassau*

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exempt from the need determination requirement. § 403.506, Fla. Stat. (1997).

cases not to be on point here because those cases concerned a wholly different issue. *Id.* at 29-32. In the Nassau cases, the PSC was asked to determine the need and standing of qualified facilities under PURPA, the federal law regulating cogenerators. The PSC points out that it specifically limited its decision to the facts of those qualified-facilities cases. *Id.* at 32.

In her dissenting opinion, Commissioner Clark construes the Siting Act and FEECA to mean that a proper applicant under section 403.519 is defined for purposes of FEECA, of which section 403.519 is a part, as "any person or entity of whatever form which provides electricity or natural gas at *retail to the public*." Order at 58 (quoting Ch. 80-65, § 5 at 214, Laws of Fla.) (alteration in original). She concludes that a utility's sale of electrical power must be a retail sale in order for that utility to be subject to PSC regulatory authority. *Id.* at 66. She notes that "wholesale sales are a matter within the sphere of federal regulation." *Id.* Commissioner Clark cites this Court's *Nassau* cases in support of her interpretation of the term "applicant" in section 403.519. *Id.* at 68. She finds those cases to be relevant in that this Court's rationale focused on the types of entities enumerated in section 403.503, Florida Statutes, and "concluded that the common denominator present in each was an obligation to serve customers." *Id.* at 68. Thus, "the need to be examined under section 403.519, Florida Statutes, was a need resulting from the duty to serve those customers." *Id.* Commissioner Clark concludes her dissenting opinion by stating:

> Our task in this case was to decide what the law is, not what it ought to be. In my view, the law is clear that Duke New Smyrna is not a proper applicant under section 403.519, Florida Statutes, and the petition must be dismissed. We should, however, move forward with our workshop so that we can make recommendations to the Legislature as to what the law ought to be.

Order at 71. In his dissenting opinion, Commissioner Jacobs agrees with the majority that Duke is a proper applicant but finds that Duke and New Smyrna "failed to provide the weight of evidence required to depart from the Commission's long-standing policy of relying on its own cost effectiveness analysis of a proposed plant." Order at 74.

In this Court, Duke and New Smyrna, who are joint appellees with the PSC, argue that a need determination as part of the permitting process for the proposed Duke plant does fall within the parameters of section 403.519. They argue that the primary determinant as to Duke's applicant status is whether Duke is a regulated utility. The appellees maintain that Duke qualifies as a regulated utility because it is regulated under federal regulatory procedures, and if Duke receives permits to operate its proposed plant in Florida, the plant's operation will be regulated in part by the PSC. Duke and New Smyrna maintain that the *Nassau* cases were decided in the context of need for power demonstrated by cogenerators and that those cases do not apply here. The appellees also rely upon the fact that Duke has filed a joint application with New Smyrna.

New Smyrna additionally presents two constitutional arguments and argues that prohibiting Duke from applying directly for a need determination would violate the dormant Commerce Clause of the United States Constitution because such action would unconstitutionally discriminate against out-of-state commerce and burden interstate commerce. New Smyrna also argues that any state requirement that Duke first obtain a contract with a retail utility to build the project is preempted by the federal Energy Policy Act of 1992, which mandates a robust competitive wholesale market.

We conclude that this case is resolved on the threshold legal issue of whether the PSC exceeded its statutory authority in granting the present determination of need. As we

stated in *United Telephone Co. of Florida v. Public Service Commission*, 496 So. 2d 116 (Fla. 1986):

> We note preliminarily that 'orders of the Commission come before this Court clothed with the statutory presumption that they have been made within the Commission's jurisdiction and powers, and that they are reasonable and just and such as ought to have been made.' *General Telephone Co. v. Carter*, 115 So. 2d 554, 556 (Fla.1959) (footnote omitted). *See also Citizens v. Public Service Commission*, 448 So. 2d 1024, 1026 (Fla. 1984).
>
> Such deference, however, cannot be accorded when the commission exceeds its authority. At the threshold, we must establish the grant of legislative authority to act since the commission derives its power solely from the legislature. *See Florida Bridge Co. v. Bevis*, 363 So. 2d 799, 802 (Fla. 1978). As we said in *Radio Telephone Communications, Inc. v. Southeastern Telephone Co.*, 170 So.2d 577, 582 (Fla.1964):
>
> > [O]f course, the orders of the Florida Commission come to this court with a presumption of regularity, Sec. 364.20, Fla. Stat., F.S.A. But we cannot apply such presumption to support the exercise of jurisdiction where none has been granted by the Legislature. If there is a reasonable doubt as to the lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested.

496 So.2d at 118.

The precise question we consider here is:

Does section 403.519, Florida Statutes, authorize the granting of a determination of need upon an application for a proposed power plant for which the owner and

operator is not a Florida retail utility regulated by the PSC and for which only thirty megawatts of the plant's 514-megawatt capacity have been committed by contract to be sold to a Florida retail utility regulated by the PSC?

While we recognize that the PSC is correct in pointing out that the *Nassau* cases were decided upon different facts and were intended to resolve different issues, we conclude that our analysis of the Siting Act, articulated in those decisions, is applicable to the present case. In *Nassau II*, we stated:

> In *Nassau Power Corp. v. Beard*, 601 So. 2d 1175, 1176-77 (Fla.1992), we recently explained:
>
> > The Siting Act was passed by the legislature in 1973 for the purpose of minimizing the adverse impact of power plants on the environment. See § 403.502, Fla. Stat. (1989). That Act establishes a site certification process that requires the PSC to determine the need for any proposed power plants, including cogenerators, based on the criteria set forth in section 403.519, Florida Statutes (1989). Section 403.519 requires the PSC to make specific findings for each electric generating facility proposed in Florida, as to (1) electric system reliability and integrity, (2) the need to provide adequate electricity at a reasonable cost; (3) whether the proposed facility is the most cost-effective alternative available for supplying electricity; and (4) conservation measures reasonably available to mitigate the need for the plant.
>
> (Footnote omitted). . . .
>
> . . . .
>
> Only an "applicant" can request a determination of need under section 403.519. Section 403.503(4), Florida

Statutes (1991), defines the term "applicant" as "any electric utility which applies for certification pursuant to the provisions of this act." An "electric utility," as used in the Act,

> means cities and towns, counties, public utility districts, regulated electric companies, electric cooperatives, and joint operating agencies, or combinations thereof, engaged in, or authorized to engage in, the business of generating, transmitting, or distributing electric energy.

Sec. 403.503(13), Fla. Stat. (1991). The Commission determined that because non-utility generators are not included in this definition, Nassau is not a proper applicant under section 403.519. The Commission reasoned that a need determination proceeding is designed to examine the need resulting from an electric utility's duty to serve customers. Non-utility generators, such as Nassau, have no similar need because they are not required to serve customers.

The Commission's interpretation of section 403.519 also comports with this Court's decision in *Nassau Power Corp. v. Beard*. In that decision, we rejected Nassau's argument that "the Siting Act does not require the PSC to determine need on a utility-specific basis." 601 So. 2d at 1178 n.9. Rather, we agreed with the Commission that the need to be determined under section 403.519 is "the need of the entity ultimately consuming the power," in this case FPL. *Id.*

641 So. 2d at 397, 398-99 (footnote omitted). Based upon our Nassau analysis of the Siting Act, we conclude that the granting of the determination of need on the basis of the present application does exceed the PSC's present authority. A determination of need is presently available only to an applicant that has demonstrated that a utility or utilities

serving retail customers has specific committed need for all of the electrical power to be generated at a proposed plant.

Our decision is founded upon our continuing recognition that the regulation of the generation and sale of power in Florida resides in the legislative branch of government.[12] The PSC, successor to the Florida Railroad and Public Utilities Commission, is an arm of the legislative branch in that the Commission obtains all of its authority from legislation.[13] Originally, the Legislature did not include among the PSC's responsibilities the authority to approve the siting of new power plants but left such authority to local government entities. In 1973, the Legislature enacted the Florida Electrical Power Plant Siting Act,[14] to preempt local government action and to consolidate approval of most state agencies into a single license. Within that law was a requirement that each utility submit a ten-year site plan estimating the utility's power generating needs and the general location of its power plants.[15] In enacting the Siting Act, the Legislature recognized a need for statewide perspective in selecting sites for power plants because of the "significant impact upon the welfare of the population, the location and growth of industry and the use of the natural resources of the state." *See* Ch. 73-33, § 1 at 73, Laws of Fla. At that time, the role of the PSC was to prepare a "report and recommendation as to the present and future needs for electrical generating capacity in the area to be served by the proposed site." *Id.* at 77.

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[12] We find the historical context offered by Commissioner Clark in her dissenting opinion to be helpful. Order at 64-71. The record also contains a relevant discussion by FPC counsel Gary L. Sasso before the PSC in proceedings below. Record on Appeal, Vol. I of Hearing Transcript at 21-50.

[13] § 350.001, Fla. Stat. (1997).

[14] Ch. 73-33, § 1 at 73, Laws of Fla.

[15] Ch.73-33, § 1 at 76 (codified at § 403.505, Fla. Stat. (Supp. 1974)).

In 1980, as part of the Florida Energy Efficiency and Conservation Act (FEECA), the Legislature changed the PSC's requirement of a "report and recommendation" to "a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act." Ch. 80-65, § 5, at 214, Laws of Fla. (codified at section 366.86, Fla. Stat. (1981)). By this statutory revision, the PSC was directed to review the regulated utilities' proposed new plants, taking into account the need for system reliability and integrity, the need for adequate reasonable-cost electricity and whether a proposed plant was the most cost-effective alternative available. *See* Ch. 80-65, § 5 at 217, Laws of Fla. The need determination provision at issue in this case was originally codified at section 366.86, Florida Statutes (1981), which was part of FEECA. The same provision is now at section 403.519 but continues to be listed within FEECA, even though it is codified immediately following the Siting Act.

The term "utility" was expressly defined for purposes of FEECA, including section 403.519, as "any person or entity of whatever form which provides electricity or natural gas at retail to the public." Ch. 80-65, § 5 at 214, Laws of Fla. Section 366.82(1), Florida Statutes (1997), provides: "For the purposesof §§ 366.80-366.85 [FEECA], and 403.519, 'utility' means any person or entity of whatever form which provides electricity or natural gas at retail to the public." In 1990, statutory revisions included an amendment that changed the term "utility" to "applicant" in the first sentence of section 403.519.[16]

Our reading of this statutory history leads us to continue to conclude that the present statutory scheme was intended to place the PSC's determination of need within the regulatory framework allowing Florida regulated utilities to propose new

[16] § Ch 90-331, § 24, at 2598, Laws of Fla

power plants to provide electrical service to their Florida customers at retail rates. This need determination, pursuant to section 403.519, contemplates the PSC's express consideration of the statutory factors based upon demonstrated specified needs of these Florida customers. The need determination is part of the process that the Legislature intended by its plain language to balance "the pressing need for increased power generation facilities" with the necessity that the state

> ensure through available and reasonable methods that the location and operation of electrical power plants will produce minimal adverse effects on human health, the environment, the ecology of the land and its wildlife, and the ecology of state waters and their aquatic life.

§ 403.502, Fla. Stat. (1997).

Accordingly, we find that the statutory scheme embodied in the Siting Act and FEECA was not intended to authorize the determination of need for a proposed power plant output that is not fully committed to use by Florida customers who purchase electrical power at retail rates. Rather, we find that the Legislature must enact express statutory criteria if it intends such authority for the PSC. Pursuant only to such legislative action will the PSC be authorized to consider the advent of the competitive market in wholesale power promoted by recent federal initiatives. Such statutory criteria are necessary if the Florida regulatory procedures are intended to cover this evolution in the electric power industry.[17] The projected need of unspecified utilities throughout peninsular Florida is not among the authorized

[17] Our conclusion is consistent with the conclusion of the North Carolina Utilities Commission, which dismissed a similar petition by an independent power producer that proposed a merchant plant in North Carolina that was opposed by Duke Power Company. The Commission's order was affirmed. *Empire Power Co. v. Duke Power Co.*, 112 N.C. App. 643, 437 S.E. 2d 540 (Ct. App. 1993).

statutory criteria for determining whether to grant a determination of need pursuant to section 403.519, Florida Statutes. Moreover, we agree with appellants that the fact of Duke's joining with New Smyrna in this arrangement for a thirty-megawatt commitment does not transform the application into one that complies with the Siting Act and FEECA.

We find no merit in the constitutional arguments advanced by New Smyrna. As to any alleged preemption or interference with interstate commerce, we find that power-plant siting and need determination are areas that Congress has expressly left to the states.[18]

Accordingly, we reverse the order of the PSC on the basis that the granting of the determination of need exceeds the PSC's authority pursuant to section 403.519, Florida Statutes (1997).

It is so ordered.

HARDING, C.J., and SHAW, WELLS, PARIENTE, LEWIS and QUINCE, JJ., concur.

ANSTEAD, J., dissents with an opinion.

ANSTEAD, J., dissenting.

I cannot concur in the majority's conclusion that the Florida Legislature has clearly prohibited the proposed action of the Commission. Indeed, it appears to me that the prohibition is based upon a strained and artificial construction

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[18] The Energy Policy Act of 1992, Pub. L. 102-486, Title VIII, Subtitle C, State and Local Authorities, section 731, provides:

> Nothing in this title or in any amendment made by this title shall be construed as affecting or intending to affect, or in any way to interfere with, the authority of any State or local government relating to environmental protection or the siting of facilities.

of various provisions of the legislative scheme that have little bearing on the issue before us today. In fact, even under the strained construction of the majority the issue would be not *whether* the petitioning utilities were proper applicants, but whether the capacity required should be permitted.

I am especially concerned with the majority's conclusion that it will not find Commission authority to act absent "express statutory criteria" for the specific circumstances presented here. Clearly, the Commission was created to regulate utilities seeking to operate in Florida. In my view that is precisely what the Commission is doing here.

APPENDIX B

SUPREME COURT OF FLORIDA

Nos. SC95444; SC95445; SC95446

TAMPA ELECTRIC CO.; FLORIDA POWER CORP.; and FLORIDA POWER & LIGHT CO.,

Appellants,

vs.

JOE GARCIA, *et al.*, as the FLORIDA PUBLIC SERVICE COMMISSION; UTILITIES COMMISSION, CITY OF NEW SMYRNA BEACH; and DUKE ENERGY NEW SMYRNA BEACH POWER CO., LTD., LLP.,

Appellees.

[September 28, 2000]

In light of the revised opinion, the Motions for Rehearing filed by Appellees Florida Public Service Commission, Duke Energy New Smyrna Beach Power Co., Ltd., L.L.P., the Utilities Commission, City of New Smyrna Beach, and Legal Environmental Assistance Foundation, are hereby denied.

SHAW, HARDING, PARIENTE, LEWIS AND QUINCE, JJ., concur.

ANSTEAD, J., dissents.

WELLS C.J., recused as of the date of the filing of the Motion for Leave to Appear as Amicus Curiae on Rehearing and Incorporated Motion for Rehearing by Enron North America ("Enron"), and did not participate in the Motion for Rehearing.

The Motion for Leave to Appear as Amicus Curiae on Rehearing filed by Enron North America ("Enron") is hearby granted.

HARDING, ANSTEAD, PARIENTE and LEWIS, JJ., concur

SHAW and QUINCE JJ., dissent.

WELLS C.J., recused as of the date of the filing of the Motion for Leave to Appear as Amicus Curiae on Rehearing and Incorporated Motion for Rehearing by Enron North America ("Enron"), and did not participate in the Motion for Rehearing.

The Motion for Rehearing filed by Amicus Curiae, Enron North America ("Enron"), is hearby denied in light of the revised opinion.

SHAW, HARDING, LEWIS and QUINCE, JJ., concur.

ANSTEAD and PARIENTE, JJ., dissent.

WELLS, C.J., recused as of the date of the filing of the Motion for Leave to Appear as Amicus Curiae on Rehearing and Incorporated Motion for Rehearing by Enron North America ("Enron"), and did not participate in the Motion for Rehearing.

A True Copy
Test:

/s/ Thomas D. Hall
THOMAS D. HALL [SEAL]
Clerk, Supreme Court

Served:

Richard C. Bellak
Stephen H. Grimes
D. Bruce May
Karen D. Walker
Susan L. Kelsey
Brent C. Bailey
Robert Scheffel Wright
John T. LaVia, III
Alan C. Sundberg
Steven G. Gey
Gail Kamaras
Alvin B. Davis
John T. Butler
Gabriel E. Nieto
Matthew M. Childs
Charles A. Guyton
Robert Pass
Joseph H. Lang, Jr.
James A. McGee
Jeff Froeschle
Thomas R. Julin
Bill L. Bryant
Katherine E. Giddings
Harry W. Long, Jr.
Lee L. Willis
James D. Beasley
Mark Seidenfeld
Bruce May
Susan L. Kelsey
Daniel S. Pearson
John C. Moyle, Jr.
Robert J. Sniffen
Leslie J. Paugh
Grace A. Jaye
David J. White
William B. Willingham
Michelle Hershel
Terry L. Kammer
Donald F. Santa, Jr.
Edward M. Mullins
Sandra K. Wolkov
Sylvia H. Walbolt
Gary L. Sasso

APPENDIX C

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 981042-EM
ORDER NO. PSC-99-0535-FOF-EM
ISSUED: March 22, 1999

IN RE: JOINT PETITION FOR DETERMINATION OF NEED FOR AN ELECTRICAL POWER PLANT IN VOLUSIA COUNTY BY THE UTILITIES COMMISSION, CITY OF NEW SMYRNA BEACH, FLORIDA, AND DUKE ENERGY NEW SMYRNA BEACH POWER COMPANY LTD., L.L.P.

The Following Commissioners participated in the disposition of this matter:

JOE GARCIA, CHAIRMAN, J. TERRY DEASON, SUSAN F. CLARK, JULIA L. JOHNSON, E. LEON JACOBS, JR.

ORDER GRANTING DETERMINATION OF NEED

BY THE COMMISSION:

ABBREVIATIONS/ACRONYMS

City - The Utilities Commission, City of New Smyrna Beach, Florida

Commission - Florida Public Service Commission

DEP - Florida Department of Environmental Protection

DSM - Demand Side Management

Duke New Smyrna - Duke Energy New Smyrna Beach Power Company Ltd., L.L.P.

Enron - Enron Power Marketing

EWG - Exempt Wholesale Generator

FEECA - Florida Energy Efficiency and Conservation Act

FERC - Federal Energy Regulatory Commission

FGT - Florida Gas Transmission Company

FMPA - Florida Municipal Power Agency

FPC - Florida Power Corporation

FPL - Florida Power and Light Company

FRCC - Florida Reliability Coordinating Council

IOU - Investor-Owned Utility

IPP - Independent Power Producer

JEA - Jacksonville Electric Authority

Joint Petitioners - The Utilities Commission, City of New Smyrna Beach, Florida and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P.

LEAF - Legal Environmental Assistance Foundation, Inc.

MW - Megawatt

MWH - Megawatt-hour

OUC - Orlando Utilities Commission

PPSA - Florida Electrical Power Plant Siting Act

Project - New Smyrna Beach Power Project

QF - Qualifying Facility

TECO - Tampa Electric Company

UCNSB - The Utilities Commission, City of New Smyrna Beach, Florida

CASE BACKGROUND

On August 19, 1998, the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. filed a Joint Petition For Determination Of Need For An Electrical Power Plant pursuant to Section 403.519, Florida Statutes. The proposed plant is a 514 megawatt natural gas fired, combined cycle plant together with a natural gas lateral pipeline and associated transmission facilities to be located in Volusia County, Florida, adjacent to Interstate 95. The Utilities Commission, City of New Smyrna Beach, a municipal electric utility within the meaning of Section 366.02(2), Florida Statutes, has an entitlement to 30 megawatts of the proposed plant's capacity and energy associated with the capacity. The City will use the capacity and energy to serve its retail customers. Duke New Smyrna will build, own, and operate the plant and will market the balance of the capacity and energy (approximately 484 MW) on the wholesale power market. As such, except for the 30 megawatts entitlement provided to the City, the proposed plant will be a merchant plant. The term "merchant plant" as used in this order is a power plant with no rate base and no captive retail customers.

There are seven intervenors and one amicus curiae in this docket. The intervenors are: Florida Power & Light Company; Florida Power Corporation; Tampa Electric Company; Florida Electric Cooperatives Association, Inc.; Legal Environmental Assistance Foundation, Inc.; U.S. Generating Company; and System Council U-4, International Brotherhood of Electrical Workers. The amicus curiae is Louisville Gas & Electric Energy Corporation. A hearing was held on December 2-4 and December 11 and 18, 1998. On December 2, we heard oral argument on Motions To Dismiss filed by FPL and FPC and Responses in Opposition of Joint Petitioners and LG&E Energy. We then heard testimony of 11 witnesses during the remaining four days of

the hearing. Oral argument on the Motions To Dismiss was continued to January 28, 1998, following submission of post-hearing briefs by the parties.

There are a broad range of legal, policy and factual issues in this docket. The Motions To Dismiss will be addressed first in this order because they represent threshold issues. A Motion For Reconsideration and a Motion To Strike are addressed following the discussion of the Motions To Dismiss. Next, the order addresses factual issues relating to whether the proposed plant meets the criteria of Section 403.519, Florida Statutes, the adequacy of the ancillary facilities associated with the plant, and the nature of the participation agreement between the Joint Petitioners.

MOTIONS TO DISMISS

I. BACKGROUND AND SUMMARY OF HOLDING

On September 8, 1998, Florida Power & Light Company filed a Motion To Dismiss Joint Petition, Request For Oral Argument, and Memorandum Of Law Supporting Motion To Dismiss (FPL Sept. Memorandum). Also on September 8, 1998, Florida Power Corporation filed a Motion To Dismiss Proceeding (FPC Motion) and Request For Oral Argument. On September 15, 1998, Joint Petitioners filed a Memorandum Of Law In Opposition To Florida Power & Light Company's Motion To Dismiss Joint Petition (Joint Pet. FPL Memorandum). On September 21, 1998, Joint Petitioners filed a Memorandum Of Law In Opposition To Florida Power Corporation's Motion To Dismiss Proceeding (Joint Pet. FPC Memorandum). On November 23, 1998, LG&G Energy Corporation filed an *Amicus Curiae* Memorandum Of Law in opposition to the Motions To Dismiss (LG&G Memorandum). Oral argument was heard at

the commencement of the hearing on December 2, 1998, and again on January 28, 1999, subsequent to the filing of briefs by the parties. This section of the order addresses the Motions To Dismiss. This section of the order is divided into three broad subject-matter categories: statutory and rule analysis; decisional law analysis; and constitutional law analysis.

As set forth in detail below, we deny the Motions To Dismiss because Joint Petitioners have stated a cause of action upon which relief can be granted. Joint Petitioners have adequately alleged all of the applicable elements required for a need determination pursuant to Section 403.519, Florida Statutes. They have also demonstrated that they are "electric utilities" pursuant to the Power Plant Siting Act; that Duke New Smyrna is an "investor-owned electric company" pursuant to Chapter 366; and, that the Project is a "joint electric power supply project" pursuant to Chapter 361, Florida Statutes. Furthermore, decisional law does not require dismissal of the petition. Finally, it is not necessary for us to address on the constitutional issues in order to adjudicate the Motions To Dismiss.

II. STATUTORY AND RULE BASES FOR NEED DETERMINATION PROCEEDINGS

Need determination proceedings in Florida are governed by Section 403.519, Florida Statutes, *Exclusive Forum For Determination Of Need.* In order to analyze the extensive legal arguments made by the parties in conjunction with the Motions To Dismiss, it is instructive to summarize the terms contained in the statute relative to entities which may initiate need proceedings.

Section 403.519, Florida Statutes, provides in pertinent part:

> On request by an applicant or on its own motion, the commission shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act . . . . The commission shall be the sole forum for the determination of this matter . . . . In making its determination, the commission shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. The commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant and other matters within its jurisdiction which it deems relevant. The commission's determination of need for an electrical power plant shall create a presumption of public need and necessity. . . .

Section 403.503(4), Florida Statutes, defines an "applicant" as:

> any electric utility which applies for certification pursuant to the provisions of this act.

"Electric utility" is defined in Section 403.503(13), Florida Statutes, as follows:

> cities and towns, counties, public utility districts, regulated electric companies, electric cooperatives, and joint operating agencies, or combinations thereof, engaged in, or authorized to engage in, the business of generating, transmitting, or distributing electric energy.

Section 403.519, Florida Statutes, was enacted in 1980, Chapter 80-65, Laws of Florida, and amended in 1990, Chapter 90-331, Laws of Florida. The Florida Electrical Power Plant Siting Act, was enacted in 1973, Chapter 73-33, Laws of Florida, and amended in 1976, Chapter 76-76, Laws of Florida, and in 1990, Chapter 90-331, Laws of Florida,

Sections 403.501-403.518, Florida Statutes. Section 403.519, Florida Statutes, is not part of the PPSA.

Need determination proceedings in Florida are also governed by Rule 25-22.081, Florida Administrative Code. The Rule provides in pertinent part:

> Petitions submitted to commence a proceeding to determine the need for a proposed electrical power plant . . . shall contain the following information:
>
> (1) A general description of the utility or utilities primarily affected. . . .
>
> (2) A general description of the proposed electrical power plant. . . .
>
> (3) A statement of the specific conditions, contingencies or other factors which indicate a need for the proposed electrical power plant. . . . If a determination is sought on some basis in addition to or in lieu of capacity needs, such as oil backout, then detailed analysis and supporting documentation of the costs and benefits is required.
>
> (4) A summary discussion of the major available generating alternatives. . . .
>
> (5) A discussion of viable nongenerating alternatives. . . .
>
> (6) An evaluation of the adverse consequences which will result if the proposed electrical power plant is not added. . . .
>
> (7) If the generation addition is the result of a purchased power agreement between an investor-owned utility and a nonutility generator, the petition shall include a discussion of the potential for increases or decreases in the utility's cost of capital. . . .

III. SUMMARY OF ARGUMENTS OF THE PARTIES

A. WHETHER DUKE NEW SMYRNA AND THE CITY ARE PROPER APPLICANTS PURSUANT TO FLORIDA STATUTES AND FLORIDA ADMINISTRATIVE CODE

1. FLORIDA POWER & LIGHT COMPANY

FPL argues that the Joint Petition does not meet the requirements of Florida Statutes or Florida Administrative Code and therefore, must be dismissed. With respect to Florida Statutes, FPL states that the Joint Petition fails to allege with specificity the manner in which it meets the statutory criteria. With respect to the rule requirements, FPL argues that the Joint Petition fails to satisfy the criteria of Rule 25-22.081, Florida Administrative Code.

2. FLORIDA POWER CORPORATION

By contrast to FPL's criteria-specific attack on the Joint Petition, FPC's arguments for dismissal are based on its global construction of the statutory framework of generation siting and planning. FPC's first argument is that the Florida Energy Efficiency and Conservation Act's[1] limitation to retail utilities, likewise limits Section 403.519 to only retail utilities. Therefore, only retail utilities may be applicants for a need determination. FPC's second statutory argument for dismissal relates to the 1973 enactment of the Power Plant Siting Act[2] which included the Ten Year Site Plan (TYSP) requirements.

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[1] Sections 366.80-366.85 and 403.519, Florida Statutes; Chapter 80-65, Section 5, Laws of Florida.

[2] Sections 403.501-403.518, Florida Statutes, Chapter 73-33, Laws of Florida.

3. DUKE NEW SMYRNA/THE CITY

Joint Petitioners advance three arguments in support of their position that they are proper applicants pursuant to Florida Statutes. First, they maintain that both the City and Duke New Smyrna are proper applicants under Section 403.519, Florida Statutes. Only "electric utilities" may be "applicants" for a need determination. The City is an "electric utility" because it is a municipality serving retail customers. Duke New Smyrna is an "electric utility" because it is a "regulated electric company", regulated by the Federal Energy Regulatory Commission. Joint Petitioners' second argument is that they are "electric utilities" pursuant to Section 366.02(2), Florida Statutes and therefore subject to the Commission's Grid Bill[3] and TYSP jurisdiction. Third, Joint Petitioners argue that they have standing to pursue the requested need determination because the project is a "joint electric power supply project" under Chapter 361, Florida Statutes. In addition to the statutory arguments, Joint Petitioners rebut FPL's and FPC's assertions that the Joint Petition does not meet the pleading requirements of Florida Statutes and Florida Administrative Code.

B. WHETHER DUKE NEW SMYRNA/THE CITY ARE PROPER APPLICANTS PURSUANT TO DECISIONAL LAW

1. FLORIDA POWER & LIGHT COMPANY

The foundation of FPL's argument for dismissal of the Joint Petition is its assertion that Duke New Smyrna is not a proper applicant pursuant to decisional law. As authority for its position, FPL cites *In Re: Petition of Nassau Power Corporation To Determine Need For Electrical Power Plant*

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[3] The provisions of Chapter 366, Florida Statutes, referred to as the Grid Bill consist of Sections 366.04(2), 366.04(5), 366.05(7), and 366.05(8); Chapter 74-96, Laws of Florida.

(Okeechobee County Cogeneration Facility), Docket Nos. 920769-EQ , 920761-EQ, 920762-EQ and 920783-EQ, Order No. PSC-92-1210-FOF-EQ, issued October 26, 1992 (*Ark and Nassau*) and *Nassau Power Corporation v. Beard*, 601 So.2d 1175 (Fla. 1992) (*Nassau I*). Under FPL's interpretation of the decisions, no non-utility generator may seek a need determination without first obtaining a contract with a state-regulated utility with an obligation to serve. The *Ark and Nassau* decision was appealed by Nassau and upheld by the Florida Supreme Court. *Nassau Power Corporation v. Deason*, 641 So.2d 396 (Fla. 1994). (*Nassau II*) According to FPL, a non-utility generator without a contract with a state-regulated electric utility is not a proper applicant under the Siting Act.

2. FLORIDA POWER CORPORATION

Like FPL, FPC argues that the *Nassau* decisions conclusively determine that a need proceeding under Section 403.519 may only be brought by a retail utility or an entity with a contract with a retail utility. In addition, FPC acknowledges that controlled overbuilding may be prudent because of economies of scale, but that does not negate the necessity of demonstrating utility specific need for the reasonably foreseeable future.

3. DUKE NEW SMYRNA/THE CITY

Joint Petitioners distinguish the *Nassau* cases and state that the cases do not constitute precedent in this proceeding because they arose on different facts. The difference is captive ratepayers. According to Joint Petitioners, *Nassau I* and *II* represent the law of non-utility generators seeking to bind retail utilities, and thus captive ratepayers, to long term power contracts. The *Nassau* cases addressed need and

standing of qualifying facilities.[4] The instant petition is distinguishable according to the Joint Petitioners because Duke New Smyrna is not seeking to force retail utilities to purchase the Project's merchant output.

C. DORMANT COMMERCE CLAUSE AND FEDERAL PREEMPTION

1. FLORIDA POWER & LIGHT COMPANY

FPL contests Joint Petitioners' constitutional arguments in three ways. First, FPL asserts that the Joint Petitioners are improperly attempting to have the Commission decide constitutional issues more properly reserved to the courts. Second, relying on *Commonwealth Edison Co. v. State of Montana*, 453 U.S. 609 (1981), FPL argues that general Congressional policy statements regarding wholesale competition do not demonstrate preemption of all state legislation on that subject. Third, relying on *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), FPL asserts that the dormant Commerce Clause does not create an absolute restriction on a state's ability to regulate. Instead, there is a traditional recognition of state's dominion over health and safety issues.

2. FLORIDA POWER CORPORATION

FPC advances three arguments in rebuttal to Duke's assertion that application of the *Nassau* decisions to the instant petition is preempted by the Energy Policy Act of 1992 under the Supremacy Clause of the United States Constitution. First, FPC argues that the Legislature's reenactment of Section 403.519 and the PPSA subsequent to the *Nassau* decisions' definitive interpretation thereof cannot

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[4] A qualifying facility is defined as a small power producer or cogenerator that meets the threshold efficiency standards set forth by the Federal Energy Regulatory Commission pursuant to PURPA, 18 C.F.R. Sec. 292.201-.211 (1991).

be overturned. Second, FPC argues that an administrative agency cannot declare a state statute unconstitutional. Third, FPC argues that federal law does not preempt states' control over siting new generation. With respect to the dormant Commerce Clause, FPC argues that generation siting and need determination are not areas Congress intended to regulate. Instead, they have been left to the states. In the alternative, FPC argues that even if Congress did intend to regulate need determinations, Florida's scheme would withstand constitutional scrutiny.

3. DUKE NEW SMYRNA/THE CITY

Joint Petitioners advance two constitutional law arguments in support of their position that a contract with a retail utility is not required to invest them with standing to bring this need determination proceeding. The first constitutional law argument is that prohibiting Duke New Smyrna from applying directly for a need determination would violate the dormant Commerce Clause because such action would unconstitutionally discriminate against out-of-state commerce and would unconstitutionally burden interstate commerce. Relying on *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) and *Pike v. Bruce Church*, 397 U.S. 137 (1970) Duke New Smyrna argues that regulations giving local economic interests a competitive advantage are unconstitutional. Duke New Smyrna's second constitutional law argument is that requiring it to first obtain a contract with a retail utility to build the project is preempted by federal utility law which mandates a robust competitive wholesale market. Relying on *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm.*, 461 U.S. 190 (1983), Duke New Smyrna maintains that FPL's and FPC's interpretations of "applicant" stand as an obstacle to the accomplishment of federal purposes.

IV. ANALYSIS

A. STANDARD OF REVIEW

A motion to dismiss raises as a question of law, whether the petition alleges sufficient facts to state a cause of action. *Varnes v. Dawkins*, 624 So.2d 349, 350 (Fla. 1st DCA 1993); *In re: Petition By Tampa Electric Company For Approval Of Cost Recovery For A New Environmental Program, The Big Bend Units 1 & 2 Flue Gas Desulfurization System*, Docket No. 980693-EI, Order No. PSC-98-1260-PCO-EI, issued September 22, 1998, pg. 6. The standard for disposing of motions to dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. *Id.* When making this determination, the tribunal must consider only the petition. All reasonable inferences drawn from the petition must be made in favor of the petitioner. *Id.*

In order to determine whether the petition states a cause of action upon which relief may be granted, it is necessary to examine the elements needed to be alleged under the substantive law on the matter. All of the elements of a cause of action must be properly alleged in a pleading that seeks affirmative relief. If they are not, the pleading should be dismissed. *Kislak v. Kredian*, 95 So.2d 510, (Fla. 1957)

The substantive law governing this docket is Section 403.519, Florida Statutes. The Joint Petition For Determination Of Need For An Electrical Power Plant states a cause of action upon which relief can be granted because it alleges all of the required elements. The Joint Petition directly addresses the five criteria of Section 403.519, Florida Statutes: 1) the need for electric system reliability and integrity; 2) the need for adequate electricity at a reasonable cost; 3) whether the Project is the most cost-effective alternative available; 4) conservation measures; and 5) other matters within our jurisdiction. In addition, the Joint Petition

meets all applicable requirements of Rule 25-22.081, Florida Administrative Code.

In sum, on its face, the Joint Petition withstands the challenges of the Motions To Dismiss. It is not necessary for the Joint Petitioners to have anticipated all conceivable defenses and allege facts which would be sufficient to negate or avoid them. *T.B. Fletcher v. Williams*, 153 So.2d 759, 764 (Fla. 1st DCA 1963). Taking all the well-pleaded allegations of the Joint Petition as true, a cause of action has been adequately alleged to justify denial of the Motions. *Id.*

In addition to the foregoing analysis, we also deny the Motions To Dismiss on the specific arguments of the parties. At issue in this docket is whether an Exempt Wholesale Generator can be an "applicant" for a need determination. Distilled to their essence, the parties' positions are as follows: Joint Petitioners allege that they are proper applicants, individually and collectively, under the plain language of the governing statutes. FPL and FPC argue that, as to the merchant portion of the Project's output, Duke New Smyrna must have a contract with a retail utility before it can seek a need determination. This is a case of first impression. We disagree with the interpretations of statutes and precedent presented by the movants and agree that the ordinary meaning of the statutes encompass an EWG applying for a need determination.

B. DUKE NEW SMYRNA AND THE CITY ARE PROPER APPLICANTS PURSUANT TO FLORIDA STATUTES AND FLORIDA ADMINISTRATIVE CODE

1. Florida Statutes

Joint Petitioners' arguments supporting their status as applicants are compelling. Joint Petitioners argue that, individually and collectively, they are proper applicants within the broader regulatory framework as well as the

specific provisions of Section 403.519, Florida Statutes. Joint Petitioners also effectively rebut FPL and FPC's arguments to the contrary.

a. Section 403.519, Florida Statutes And the Power Plant Siting Act

It is uncontroverted that the City is a proper applicant for a need determination. The City is a retail-serving municipal electric utility and thus, one of the seven enumerated entities within Section 403.503(13). The City has an entitlement to 30 megawatts of the Project's capacity and has the contractual right to purchase energy associated with that capacity. The City will use the capacity and energy to serve the needs of its retail customers.

Duke New Smyrna is also a proper applicant for a need determination. Duke New Smyrna maintains that it is a proper applicant for a need determination both as a joint applicant with the City, and individually as a "regulated electric company". Duke New Smyrna argues that it is an "applicant" in its own right based on the plain meaning of the definitions contained in the PPSA and the Grid Bill. In addition, Duke New Smyrna alleges that the Project is a Joint Electrical Power Supply Project within the meaning of Chapter 361, Florida Statutes.

As set forth above, Section 403.503(13), Florida Statutes, defines "applicant" as any "electric utility" which, in turn, is defined, among other things, as "regulated electric companies". Thus, a regulated electric company is a proper applicant pursuant to the plain language of the statute.

Duke New Smyrna is both "regulated" and an "electric company" and therefore clearly meets the statutory definition of applicant. Duke New Smyrna is a public utility pursuant to the Federal Power Act, 16 U.S.C. Sec 824(b)(1) (FPA) and an EWG pursuant to the Public Utility Holding Company Act of 1935, 15 U.S.C. Secs. 79z-5a. As a public utility and an

EWG, Duke New Smyrna is regulated by the Federal Energy Regulatory Commission.

In addition to being a regulated electric company, Duke New Smyrna will be engaged in at least one of the qualifying activities listed in Section 403.503(13). The definition is phrased in the disjunctive. An "electric utility" is one of the enumerated entities which must be engaged in the business of generating, transmitting, *or* distributing electric energy. "In its elementary sense, the word 'or,' as used in a statute, is a disjunctive article indicating an alternative." *TEDC/Shell City, Inc. v. Robbins*, 690 So.2d 1323, 1325 FN4 (Fla. 3rd DCA 1997) *quoting* 49 Fla. Jur.2d Statutes § 137, at 179(1984). Clearly, the Legislature intended the Power Plant Siting Act to govern electric utilities performing one or more of those functions. Duke New Smyrna proposes to engage in generation, and to a limited extent, transmission, of electricity. It therefore complies with the functional requirement of the statute.

FPL's and FPC's arguments that Duke New Smyrna should not be granted applicant status require us to add limiting language to the PPSA statutory definitions. FPL's argument is that "regulated electric company" means "*state* regulated electric company". FPC's argument is that "electric utility" means "*retail* electric utility". In combination, FPL and FPC would require that in order to build a power plant in the State of Florida, it is necessary to be a vertically-integrated utility, serving retail customers, subject to traditional rate regulation of the Commission. We find that the argument is not supported by the facts or the law. FPL's interpretation is based primarily on its analysis of decisional law and is addressed in a different section of this order. FPC's argument is discussed below.

Section 403.503(13), Florida Statutes, does not use the word "retail" before the phrase "electric utility". Yet, FPC argues that the word "retail" should be read into the statute.

To reach its conclusion, FPC analyzes the enactment of Florida Energy Efficiency and Conservation Act and submits an "interchangeable definition" argument. Section 403.519, Florida Statutes, was enacted in 1980 as part of FEECA. According to FPC, because Section 366.82, Florida Statutes, limits the definition of "utility" to a retail provider, that same limitation applies to the definition of "applicant" as that term is used Section 403.519, Florida Statutes. "The most reasonable construction of these terms is that the Legislature used the words "electric utility," "utility," and "applicant" interchangeably for purposes of electric industry need proceedings. . . ." FPC's conclusion is that Duke lacks standing to bring the instant proceeding because it is a wholesale and not a retail power producer.

FPC's analysis is incorrect. First, while Section 403.519, Florida Statutes, is not part of the PPSA, its definitions are governed by the PPSA, not FEECA. Section 403.519 Florida Statutes, states, in part: "On request by an *applicant* . . . the commission shall begin a proceeding to determine the need for an electrical power *plant subject to the Power Plant Siting Act*. . . ." (emphasis added) The PPSA defines and governs "applicants". By contrast, FEECA defines and governs "utilities". Neither the PPSA nor Section 403.519 Florida Statutes, use the word "utility" as a defining entity and, thus, are not governed by the FEECA definition.

Second, FPC's assertion that "applicants" are the same as FEECA "retail utilities" utterly disregards the law relative to entities required to file need determinations under the PPSA. Section 366.82 of FEECA exempts small electric cooperatives and municipalities with sales of less than 2,000 gigawatt hours. The cities of Tallahassee, Lakeland and Kissimmee, and Seminole Electric Cooperative are all exempt from FEECA. Notwithstanding that, all four entities must file for need determinations with this Commission. The City of Lakeland currently has a petition for need determination

pending before us. (Docket No. 990023-EM) The City of Kissimmee was granted a need determination in late 1998. (Docket No. 980802-EM, Order No. PSC-98-1301-FOF-EM, issued October 7, 1998) The City of Tallahassee was granted a need determination in the summer of 1997. (Docket No. 961512-EM, Order No. PSC-97-0659-FOF-EM, issued June 9, 1997) Seminole Electric Cooperative was granted a need determination in 1994. (Docket No. 931212-EC, Order No. PSC-94-0761-FOF-EC, issued June 21, 1994) Under FPC's construction of FEECA, none of these entities would have to file petitions for need determination. Clearly FPC's analysis is inconsistent with the requirements of the PPSA.

Third, the FPC's interchangeable definition argument ignores two fundamental tenets of statutory construction. When a definition of a word or phrase is provided in a statute, that meaning must be ascribed to the word or phrase whenever it is repeated in the statute unless contrary intent clearly appears. *Vocelle v. Knight Brothers Paper Company, Inc.*, 118 So.2d 664, (Fla. 1st DCA 1960) In addition, when different definitions are provided for different sections, the distinctions must be presumed to be intentional. *Florida State Racing Commission v. Bourquardez*, 42 So.2d 87 (Fla. 1949)(The presence of a provision in one portion of a statute and its absence from another are an argument against reading it as implied by the section from which it is omitted). The greater weight of authority is clearly in favor of refraining from amending the statute by administrative decision as advocated by FPC. Thus, we hold that it is not necessary to be a retail electricity provider to be an applicant under the PPSA.

b. Chapters 366 and 186, Florida Statutes; The Grid Bill And TYSP

Duke New Smyrna has not come to this proceeding seeking to build a power plant while at the same time exempting itself from ongoing regulatory jurisdiction of the

Commission. On the contrary, Duke New Smyrna agrees that it is subject to the Commission's Grid Bill and TYSP regulatory requirements. We agree. This fact effectively negates FPL's and FPC's arguments for dismissal that Duke New Smyrna cannot be an applicant under the PPSA because it is not subject to the broader regulatory framework.

Duke New Smyrna is an "electric utility" pursuant to Chapter 366 and is, therefore, subject to our Grid Bill authority. Section 366.02(2) defines "electric utility" as:

> any municipal electric utility, investor-owned electric company, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission or distribution system within the state.

This statute is also worded in the disjunctive. Owning one of the three electricity functions is sufficient to bring an investor-owned electric company within its express terms. Duke New Smyrna is an "investor-owned electric company" in that it is owned by its partners, Duke Energy Power Services Mulberry GP, Inc. and Duke Energy Global Asset Development, Inc. In addition, the Project will be generating electricity thus meeting the functional requirements.

An important nuance of this argument is that FPL's and FPC's restrictive interpretations have the effect of diminishing our grid responsibility. Duke New Smyrna interprets our Grid Bill jurisdiction more broadly:

> The Opponents' argument that one power plant does not constitute a "system" is spurious and would irrationally deprive the Commission of jurisdiction over such power plants. For example, if an existing power plant in Florida was sold to an EWG that then operated the plant as a merchant facility, the Opponents' rationale would leave the Commission without authority or jurisdiction

> to fulfill its Grid Bill responsibilities with respect to such plant.

(Joint Pet. Brief, pg. 18)

We agree with Duke New Smyrna's interpretation of Section 366.02(2), Florida Statutes. That analysis gives efficacy to the plain meaning of the whole statute. "When the words of a statute are plain and unambiguous the courts must give to them their plain meaning. . . . A statute should be so construed as to give a meaning to every word and phrase in it and, if possible, so as to avoid the necessity of going outside the statute for aids to construction." *Vocelle*, at 667.

Like its interchangeable definition argument, FPC's statutory analysis relating to the 1973 enactment of the Power Plant Siting Act is also problematic. The enactment of the PPSA included the Ten Year Site Plan (TYSP) requirements now codified at Section 186.801, Florida Statutes. FPC's hypothesis is that because the TYSP provisions require each electric utility to submit plans estimating *its* generation needs, TYSP submissions are therefore impliedly limited to retail utilities because "only a retail utility can have "its" own power generating needs because only a retail utility is obligated to sell power to the public." (FPC Brief pg. 12) FPC's logic is that because the PPSA was enacted at the same time as the TYSP provisions, and the TYSP provisions are *by implication* limited to retail utilities, the PPSA is likewise limited to retail utilities. Thus, notwithstanding the fact that the PPSA does not use the term "retail" in any of its provisions, FPC urges us to insert the word into the PPSA.

FPC's argument fails in two ways. First, as stated above, Section 403.503(13), Florida Statutes, is worded in the disjunctive. If the Legislature had intended the PPSA to be limited to vertically-integrated retail utilities, it would have used the conjunctive "and" or it would have specified "retail" utilities. Elsewhere in the statutory regulatory framework, the

limitation to retail is express.[5] In the absence of ambiguity, it is inappropriate for us to look outside the four corners of the statute for guidance as to its application. *Armstrong v. City of Edgewater*, 157 So.2d 422 (Fla. 1963) Second, an electric utility that is engaged only in generation is necessarily a wholesale power producer. It is logical that the Legislature intended to address the broader spectrum of power producers in order to fully effectuate its purposes of environmental protection. This position is supported by the fact that the Legislature has recognized specific exemptions to the PPSA—steam or solar electrical generating facilities of less than 75 megawatts in capacity. Section 403.503(12), Florida Statutes. Obviously, the Legislature was aware of the different types of generation which may seek to be permitted under the PPSA. It is inappropriate for us to amend the statute, as advocated by FPC, by administrative decision in the absence of ambiguity.

c. Joint Electrical Power Supply Projects Pursuant To Chapter 361, Part II, Florida Statutes

In addition to its arguments that it is an applicant pursuant to Section 403.519, Florida Statutes, Duke New Smyrna argues that the Project is a Joint Electrical Power Supply Project pursuant to Chapter 361, Part II, Florida Statutes. Joint operating agencies are one of the enumerated applicants under the PPSA. Section 361.12, Florida Statutes provides that an "electric utility" is authorized to join with a "foreign public utility" for the purpose of "jointly financing constructing, managing, operating, or owning any project or projects." "Electric utility" is defined as:

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[5] Section 366.82, Florida Statutes, defines "utility" as an entity that provides electricity "at retail to the public".

> any municipality, authority, commission, or other public body, . . . which owns or operates an electrical energy generation, transmission, or distribution system within the state on June 25, 1975.
>
> Section 366.11(12), Florida Statutes.

"Foreign public utility" is defined as:

> any person, as defined in subsection (3), the principal location or principal place of business of which is not located within this state, which owns, maintains, or operates facilities for the generation, transmission, or distribution of electrical energy and which supplies electricity to retail or wholesale customers, or both, on a continuous, reliable, and dependable basis; or any affiliate or subsidiary of such person, the business of which is limited to the generation or transmission, or both, of electrical energy and activities reasonably incidental thereto.

Section 361.11(4), Florida Statutes.

Finally, "project" is described as:

> a joint electric power supply project and any and all facilities, including all equipment, structures, machinery, and tangible and intangible property, real and personal, for the joint generation or transmission of electrical energy, or both including any fuel supply or source useful for such a project.

Joint Petitioners fit squarely within the definitions contained in Chapter 361. The City is clearly an entity within the definition of "electric utility". And, Duke New Smyrna is a "foreign public utility". This is so because Duke New Smyrna is an affiliate of Duke Bridgeport Energy, L.L.C., a person (i.e. corporation) with a principal place of business outside the state which currently owns, maintains and

operates facilities for the generation of electrical energy and which supplies electricity to wholesale customers on a continuous, reliable and dependable basis. In sum, the City, an "electric utility", has exercised its authority under Section 361.12, Florida Statutes, to join with Duke New Smyrna, a "foreign public utility" for the purpose of jointly financing and acquiring a "project", the proposed plant. As such, the City and Duke New Smyrna are a "joint operating agency" and are thus proper applicants for a need determination pursuant to Section 403.519.

FPL contests the application of Chapter 361 to Joint Petitioners. FPL's first argument is that the limiting language of Chapter 361 to the effect that the statute does not limit or alter any provisions of any other law, also applies to the caselaw interpreting the Siting Act, specifically, the *Nassau* decisions. FPL's second argument is that the Joint Power Act does not apply to Joint Petitioners because they do not *currently* own, maintain or operate facilities. (FPL Sept. Memorandum, pg. 30)

FPL's arguments are not persuasive. First, the *Nassau* decisions were rendered well after the Joint Power Act was enacted; therefore, the Joint Power Act limiting language cannot be read to have incorporated those holdings. Second, FPL's argument ignores the fact that Duke New Smyrna is an affiliate of a foreign electric utility, Duke Bridgeport Energy, L.L.C., which currently owns, maintains and operates facilities outside the state. Section 361.11(4), Florida Statutes, specifically provides that a "foreign electric utility" is "a person . . . or any affiliate or subsidiary of such person, the business of which is limited to the generation or transmission, or both, of electrical energy . . . ." Clearly, Duke New Smyrna falls within the unambiguous meaning of the statutory definition.

2. Florida Administrative Code

One of FPL's arguments for dismissal of the Joint Petition construes the provisions of Rule 25-22.081, Florida Administrative Code, as they relate to, and allegedly are not satisfied by, the Joint Petition. First, FPL alleges, there is no description of the *specific* utility or utilities primarily affected by the proposed plant. Second, according to FPL, the Joint Petition fails to identify the utility specific conditions or contingencies, such as forecasted summer and winter peaks, the number of customers, net energy for load and load factors, which indicate a need for the proposed power plant required by subsection (3) of the Rule. According to FPL, the Petitioners' statements of peninsular Florida's conditions and contingencies are insufficient because "peninsular Florida" is merely a planning convention, not a utility. Third, FPL opines that the Joint Petition "abysmally fails" to adequately address the subsection (5) requirement of an analysis of viable nongenerating alternatives. Finally, FPL asserts that the Joint Petition fails to meet the subsection (7) requirements of the Rule of an economic impact statement.

FPL's arguments regarding rule requirements are disingenuous. First, the Joint Petition does identify "primarily affected utilities". They are the City and Duke New Smyrna. That the Joint Petition does not specifically identify secondarily affected utilities in peninsular Florida is a function of the fact that the purchase of power from the Project is voluntary. No retail utility can or will be required to contract for the Project's output.

Second, FPL's complaint that the Joint Petition does not allege need but rather "attempts to finesse" the need allegation by stating that the Project is "consistent with" the need for electric system reliability and integrity is neither supported by the rule nor Commission precedent. The Rule states:

> . . . If a determination is sought on some basis *in addition to or in lieu of capacity needs*, such as oil backout, then detailed analysis and supporting documentation of the costs and benefits is required.

Rule 25-22.081(3), Florida Administrative Code (emphasis added)

Thus, the Rule *specifically* allows a need determination proceeding to be brought on a basis other than megawatt need. That is precisely what the Joint Petitioners have proposed with respect to the Project's merchant capacity, and their Petition is supported by the rule as well as precedent.

We have previously approved need based on peninsular Florida needs for peak demand. For example, in approving Jacksonville Electric Authority and FPL's petition for need determination for the St. John's River Power Park, we stated:

> We construe the "need for power" issue to encompass several aspects of need . . . . Should the Commission's FEECA goals governing the growth of seasonal kilowatt demand be achieved, and we are of the opinion that they can reasonably be achieved, additional generating capacity for the purpose of insuring adequate supplies of power and energy to peninsular Florida electric consumers does not appear to be required until 1991. Similarly, JEA and FPL do not appear to require additional generating capacity for reliability purposes until 1991 and 1989 respectively. . . .

In re: JEA/FPL's Application Of Need For St. John's River Power Park Units 1 and 2 And Related Facilities, Order No. 10108, Docket No. 810045-EU, issued June 26, 1981. *See also In re: Petition For Certification Of Need For Orlando Utilities Commission, Curtis H. Stanton Energy Center Unit 1, And Related Facilities*, Order No. 10320, Docket No. 810180-EU, issued September 2, 1981.

In short, we have a long history of approving need determination petitions based on economic need rather than strict and immediate capacity requirements.

FPL's argument that the Joint Petition must be dismissed because it fails to allege, among other things, the cost of capital increases pursuant to subsection (7) of the Rule is misplaced. By its terms, subsection (7) applies only to investor-owned utilities which propose to contract with non-utility generators. The Project is not the result of a purchased power agreement of this type and thus the rule does not apply. And, contrary to FPL's allegations, it does not appear that Duke New Smyrna is attempting to avoid this mandatory rule requirement by omitting to enter into contracts with retail utilities. The omission arises from the fact that retail utilities' purchase of power from the Project is purely discretionary.

C. DUKE NEW SMYRNA/THE CITY ARE PROPER APPLICANTS PURSUANT TO DECISIONAL LAW

FPL dedicates a substantial portion of its legal arguments for dismissal to its thesis that, pursuant to decisional law, Joint Petitioners are not proper applicants as to the plant's merchant capacity—the 484 MW not committed to the City. According to FPL, Duke New Smyrna is not a proper applicant because it has no obligation to serve and no contract with a state regulated utility for its capacity. As authority for its position, FPL cites *Ark and Nassau*, *Nassau I* and *Nassau II*.

FPL relies primarily on the Commission's *Ark and Nassau* decision. According to FPL, the decision stands for the following three propositions. First, need determination proceedings may only be initiated by "applicants" under Section 403.519, Florida Statutes. Second, it is the need arising from the obligation to serve customers that a need determination proceeding is designed to examine. Third, without a contract with the utility with an obligation to serve,

the non-utility generators had no need of their own. The requirement of a contract with a utility was intended to recognize the utility's planning process. According to FPL, the *Ark and Nassau* decision is dispositive in the instant case and Duke New Smyrna is not an applicant because it does not have an obligation to serve customers or a contract with a utility to sell its output. The *Ark and Nassau* decision was appealed by Nassau and upheld by the Florida Supreme Court. *Nassau Power Corporation v. Deason*, 641 So.2d 396 (Fla. 1994). FPL states that the Court's "complete affirmation of the Commission's construction of the Siting Act in the *Ark and Nassau* decision should leave no doubt as to the proper disposition of this need determination petition."

FPC also relies on the *Nassau* decisions as support for its Motion To Dismiss. According to FPC the cases represent the following three holdings: (1) need is utility and unit specific and therefore cannot be determined on a statewide basis; (2) only entities with an obligation to serve customers can demonstrate need; (3) if an entity does not have a duty to serve, it must have a contract with an entity that does have a duty to serve. FPC declares that the Nassau decisions conclusively determine that a need proceeding under Section 403.519 may only be brought by a retail utility.

We acknowledge that, divorced from the facts giving rise to the litigation, the holdings in the *Nassau* cases could appear to be persuasive in the instant docket. However those decisions must be considered on their facts and the facts are quite different. The differences are captive ratepayers and the specter of a retail utility being *required* to purchase unneeded electricity. The *Nassau* cases addressed need and standing of QFs under the cogeneration regulations.

> Under the cogeneration regulations, Florida utilities are *required* to purchase cogenerated power based on the utilities' "avoided costs"—that is, the costs that the utilities would incur to produce the same amount of

> electricity if they did not instead purchase the cogenerated power from a qualifying facility. . . . Presuming need under the Siting Act by way of the cogeneration regulations, however, *presented the awkward possibility that individual utilities would be required to purchase electricity that neither they nor their customers actually needed.*

Nassau I, 601 So.2d at 1177. (emphasis added)

In *Nassau I*, the Supreme Court affirmed our decision in Order No. 22341, Docket No. 890004-EU, issued Dec. 26, 1989. In that order, we reversed the practice of presuming that a particular cogenerator's power was needed. Instead of presuming need, we held that when a QF, which by law was seeking to require a utility to purchase its output, filed a need determination, it must prove need based on the requirements of the targeted purchasing utility.

That *Nassau I* is limited to the law of QF cogeneration cannot seriously be disputed: "At issue is the relationship, if any, between the requirements of the Siting Act and the requirements of the PSC's regulations governing small power producers and cogenerators." (footnotes omitted) 601 So.2d at 1175. *Nassau I* does not apply to a non-utility generator that does not seek to force any retail utility to purchase its capacity.

Likewise, *Ark and Nassau* is about cogenerators seeking to force a retail utility to purchase power. The language of Ark Energy's Petition for need determination is telling. Ark Energy petitioned the Commission to:

> [R]eview and approve the attached firm capacity and energy contract between Florida Power & Light Company . . . and Pahokee Power Partners II, Limited Partnership, . . . and find that this Contract is reasonable and prudent and in the best interest of FPL's customers;

> *require FPL to enter into this contract* with Pahokee Power Partners II. . . .

(emphasis added)

In Re: Petition of Ark Energy, Inc. And CSW Development-I, Inc. for Approval Of Contract For The Sale Of Capacity And Energy To Florida Power & Light Company, Docket No. 920762-EQ, Document No. 08299-92, filed July 27, 1992 at pg. 1.

Neither Ark nor Nassau had a contract with FPL prior to commencing the proceeding yet they sought to require FPL to purchase their output and bind the retail ratepayers. We ruled that if a utility has to buy the power, that utility's needs must first be evaluated. However, we expressly limited our decision to its facts. *"It is also our intent that this Order be narrowly construed and limited to proceedings wherein non-utility generators seek determinations of need based on a utility's need."* Order No. PSC-92-1210-FOF-EQ, Docket No. 920783-EQ, issued October 26, 1992 at page 4 (Emphasis added).

Thus, the language quoted by FPL and FPC regarding non-utility generators and utility-specific need is not applicable in this docket. There are no captive ratepayers being required to pay for the merchant portion of the Project because Duke New Smyrna is not seeking to require retail utilities to purchase the proposed plant's merchant output. On the contrary, if retail utilities purchase the merchant output of the Project, those purchases will be strictly voluntary and they will only be made if it is economic to do so. This is a case of first impression arising on facts clearly distinguishable from the cogeneration precedent. As such, we are not overruling prior precedent with respect to need determination proceedings involving a QF.

C. DORMANT COMMERCE CLAUSE AND FEDERAL PREEMPTION

Joint Petitioners and Amicus Curiae raise two constitutional law arguments with respect to the issue of whether a contract with a retail utility is required in order to invest Duke New Smyrna with standing to bring this need determination as advocated by FPL and FPC. FPL raises a threshold challenge to the constitutional analysis by stating that we lack authority under the Separation of Powers provision of Article II, Section 3 of the Florida Constitution to undertake such an analysis. As authority for its position FPL cites, inter alia, *Palm Harbor Special Fire Control District v. Kelly*, 516 So.2d 249 (Fla. 1987).

We disagree with FPL's conclusion regarding administrative adjudication of constitutional issues. This issue was thoroughly addressed in the recent First District Court of Appeals case *Communications Workers of America, Local 3170 v. City of Gainesville*, 697 So.2d 167 (1st DCA 1997). The *Communications Workers* court recognized that administrative agencies lack jurisdiction to invalidate statutes, but that it is not uncommon for administrative agencies to be called upon to construe the application of statutes they are charged with enforcing and interpreting. "The notion that the constitution stops at the boundary of an administrative agency's jurisdiction does not bear scrutiny." *Id.* at 170 *citing Patsy v. Board of Regents of Florida*, 457 U.S. 496 (1982). In the instant case, Duke New Smyrna is not challenging the constitutional validity of Section 403.519, Florida Statutes. Rather, it is challenging the constitutionality of interpreting the statute to require an EWG to contract with a retail utility as a condition precedent to applying for a need determination. This decision clearly falls squarely within our administrative expertise.

The negative or dormant Commerce Clause prohibits state regulation that discriminates against, or unduly burdens

interstate commerce thereby impeding free private trade in the national marketplace. *General Motors Corporation v. Tracy*, 519 U.S. 278 (1997) The crucial inquiry is determining whether a protectionist measure can fairly be viewed as protecting legitimate local concerns, with effects on interstate commerce that are only incidental. But, "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) The dormant Commerce Clause restriction on state regulatory authority evolves from the Constitution and, therefore, applies even in the absence of any federal statute preempting a particular state regulation. *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.2d 701, 710 (3rd Cir. 1995)

The parties argue animatedly either for or against application of the dormant Commerce Clause and federal preemption on the issue of whether an EWG can be required to enter into a contract with a retail utility before applying for a need determination. A contract requirement, opine Joint Petitioners, makes the regulated utilities the gatekeepers of the wholesale power market in Florida. Joint Petitioners and Amicus cite numerous United States Supreme Court cases in support of their position that such an application of state regulation is economic protectionism and *per se* invalid. FPL and FPC counter with a series of United States Supreme Court cases they allege validates their construction.

Having considered the well-reasoned arguments of counsel and authority cited by them, we find that while it is incumbent upon us to remain cognizant of Commerce Clause analysis, is not appropriate for us to reach a decision on the issue because there is insufficient evidence in the record to fully adjudicate it. Likewise, to arrive at a decision on the Motions To Dismiss, it is not necessary for us to reach a definitive conclusion on federal preemption. The decision as

to whether Joint Petitioners are applicants for a need determination in the absence of a contract with a retail utility can be made by construing Florida's existing statutory, regulatory framework for retail and wholesale generation being mindful of, but without resort to, a finding of federal preemption.

In sum, we hold that FPL's and FPC's Motions To Dismiss the Joint Petition For Determination Of Need are denied. The Joint Petitioners have standing to bring this need determination. In addition, the Joint Petition satisfies all of the elements for a need determination proceedings pursuant to Florida Statutes and Florida Administrative Code. This decision does not overrule, limit or alter the *Nassau* decisions because this case must be distinguished on its facts.

FLORIDA WILDLIFE FEDERATION'S PETITION FOR RECONSIDERATION

Florida Wildlife Federation (FWF) filed a Petition to Intervene on November 13, 1998. No parties opposed FWF's petition. FWF's petition was denied by the Prehearing Officer in Order No. PSC-98-1598-PCO-EM, issued December 1, 1998. FWF filed a Petition for Reconsideration of Hearing Officer's Order Denying Intervention on December 11, 1998. FWF's petition for reconsideration was timely, and it met the pleading requirements of Chapter 120, Florida Statutes, and Rules 25-22.0376 and 25-22.039, Florida Administrative Code. We address FWF's motion below.

I. STANDARD FOR MOTIONS FOR RECONSIDERATION

It is well settled that an agency may reconsider its final Order if the Order is found to have been based on mistake, inadvertence or a specific finding based on adequate proof of changed conditions or other circumstances not present in the

proceedings which led to the Order being modified. *People's Gas System, Inc. v. Mason*, 187 So.2d 335 (Fla. 1966). The purpose of a reconsideration proceeding is to bring to the attention of the agency some matter which it overlooked or failed to consider when it rendered its Order. *Diamond Cab Co. v. King*, 146 So.2d 889 (Fla. 1962). The mere fact that a party disagrees with the Order is not a basis for rearguing the case. *Id.* Nor is reweighing the evidence a sufficient basis for reconsideration. *State v. Green*, 104 So.2d 817 (Fla. 1st DCA 1958).

FWF has not demonstrated mistake of fact or law or inadvertence. We believe that we properly applied the law of standing to FWF in denying FWF intervention by Order No. PSC-98-1598-PCO-EM, issued December 1, 1998.

A. FWF'S SUBSTANTIAL INTERESTS ARE NOT WITHIN THE ZONE OF INTERESTS TO BE PROTECTED BY SECTION 403.519, FLORIDA STATUTES

FWF alleged in both its *Petition to Intervene and its Petition for Reconsideration of Hearing Officer's Order Denying Intervention* that its substantial interests will be affected by the Commission's decision in this docket. FWF alleges that its substantial interests are as follows:

> FLORIDA WILDLIFE FEDERATION (FWF) is a non-profit Florida corporation with over 13,000 members who reside within the state and whose main purpose is to protect, manage and conserve Florida's wildlife, for the benefit of the people of the State of Florida, the wildlife, FWF and its members. Numerous members of the organization hunt, fish, observe, study and photograph wildlife throughout the state. Approval of the Joint Petition would result in injury or harm to Florida's wildlife population, causing them to decline and not be available for the benefits of FWF and its members as

> stated further below. FWF and its members are substantially affected by the issues to be determined in these proceedings. FWF *Petition to Intervene* at 2).

FWF's statement of substantial interest alleges interests which lie outside the purview of Section 403.519, Florida Statutes. FWF's substantial interests are asserted to be the conservation of wildlife and wetlands for its members to enjoy. These environmental concerns are beyond the scope of Section 403.519, Florida Statutes, and outside the area of our expertise.

1. STANDING

Following Florida standing law as it was expressed in *Agrico Chem. Co. v. Dept. of Envt'l. Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981), petitioners to intervene in a docket must have standing. In order to have standing, petitioners must have a substantial interest in the outcome of the proceeding. To have substantial interest in the outcome of the proceeding, the petitioner must show:

> 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury. (at 482)

Standing is further defined and clarified in *Florida Soc. of Ophthalmology v. State Bd. of Optometry*, 532 So. 2d 1279 (Fla. 1st DCA 1988). In that case, the court elaborated on both the reasons for and the history of standing:

> The concept of standing is nothing more than a selective method for restricting access to the adjudicative process, whether it be administrative or purely judicial, by limiting the proceeding to actual disputes between persons whose rights and interests subject to protection

> by the statutes involved are immediately and substantially affected. Thus it has been stated, the 'purpose of the law of standing is to protect against improper plaintiffs.' *citing* 59 Am.Jur.2d, *parties* Sec. 30 (1987) (at 1284)

It is beyond dispute that the present petition presents rights which will be determined through the power plant siting process under Chapter 403, Florida Statutes. However, the putative intervenor has not shown that its rights will be determined under Section 403.519, Florida Statutes, which is the authority under which we conduct the need determination portion of the multiagency power plant siting process. FWF's interests may be determined during the proceedings before the Department of Environmental Protection. The court in *Florida Soc. of Ophthalmology* used a three part definition for "party" to the litigation:

> The basic definition of party in section 120.52(12) includes three categories of persons. Reduced to a simplistic statement, persons entitled to standing as a party are those who (1) are denominated as such by the constitution, a statute, or a rule (regulation); or, (2) have a substantial interest that is directly affected by proposed agency action; or, (3) in the exercise of the agency's discretion, are accorded the right to become a party by intervention in an existing proceeding . . . . Although one need not have his rights *determined* to become a party to a licensing proceeding, party status will be accorded only to those persons who will suffer an injury to their substantial interests in a manner sought to be prevented by the statutory scheme. (at 1284)

In the *Florida Soc. of Ophthalmology* case, the court approved a denial of standing to challenge a licensing procedure because the intervenors alleged economic injury and that their interests would be adversely affected in a manner different from the general public. As such, in that

case, the intervenors did not satisfy the immediacy requirement. The court further held that they did not show "a zone of interest personal to them that would be invaded by the certification process." (Id. at 1285)

In the present petition, FWF has not alleged any injury to itself or its members that is any different from that which could be suffered by the public generally. As the court in *Florida Soc. of Ophthalmology* stated, the "petition contains no allegations of any facts personal to any particular applicant, petitioner, or patient that show that any certified optometrist's exercise of this new privilege would be medically deficient and cause anyone injury." (at 1286)

FWF alleges a potential harm to the wildlife of Florida arising from our decision in this docket. FWF alleges this would, in turn, harm its members and the citizens of Florida who would no longer be able to enjoy the wildlife for recreational and educational purposes. Not only is this harm one that is not peculiar to FWF or its members, this allegation of harm is also so remote and speculative as to fail to meet the immediacy requirement. FWF has produced no evidence to support the claim that one 514 MW electric power plant on approximately 30 acres of land would decimate the wildlife population of the entire state. FWF's arguments about the "floodgate" effect of siting numerous merchant plants and the negative impact they might have on the wildlife population of Florida are also too remote and speculative to provide an adequate basis for standing.

II. STANDARD FOR ASSOCIATION STANDING

Florida Homebuilders Ass'n. v. Dept. of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982), held that an association's standing to bring a rule challenge under Section 120.56(1), Florida Statutes, requires a person to show that it was "substantially affected" by the challenged rule. This test for association standing was extended in

Farmworker Rights Org. v. Dept. of Health, 417 So. 2d 753 (Fla. 1st DCA 1982). The *Farmworker* case established that there is no difference between a rule challenge and a Section 120.57, Florida Statutes, hearing for the purposes of determining standing.

Subsequently, the First District Court of Appeal recognized that, in the context of standing, there can be a difference between the concepts of "substantially affected" persons and persons whose "substantial interests" are affected by an agency's action. The court suggested that *Farmworker* is not applicable to every case in which an association seeks to institute a Section 120.57 proceeding. *Florida Soc. of Ophthalmology* supra. *Florida Soc. of Ophthalmology* appears aimed at the first prong of the *Florida Homebuilders Ass'n.* test which provides that an association must demonstrate that a substantial number of its members are substantially affected by the agency's action. The Court does not address the applicability of the second and third prongs of *Florida Homebuilders*, relating to the requirement that the subject matter of the proceeding be within the association's general scope of interest and activity; and, that the relief requested is of the type appropriate for an association to receive on behalf of its members.

Florida Homebuilders Ass'n. and *Florida Soc. of Ophthalmology*, when read together, suggest that the appropriate test for association standing in this case is whether the FWF's petition, has demonstrated: (1) that a substantial number of its members have substantial interests which are affected by the present action; (2) that the subject matter of the proceeding is within the association's general scope of interest and activity; and (3) that the relief requested is of the type appropriate for an association to receive on behalf of its members.

Under the first prong of the *Florida Homebuilders Ass'n.* test associations must meet the *Agrico* test outlined above.

When the FWF's petition is read under *Agrico*, the *Florida Homebuilders Ass'n.* and *Florida Soc. of Ophthalmology* cases, it fails to meet the tests of *Agrico*, the *Florida Homebuilders Ass'n.* and *Florida Soc. of Ophthalmology* because the petitioners have not shown: (1) "a zone of interest personal to them that would be invaded" by this proceeding under Section 403.519, Florida Statutes, which would rise to the substantial interest test; and (2) that the need determination to be decided under Section 403.519, Florida Statutes, is within the association's general scope of interest and activity. The third prong of the *Florida Homebuilders Ass'n.* and *Florida Soc. of Ophthalmology* test for association standing, determining that the relief requested is of the type appropriate for an association to receive on behalf of its members, could arguably be met here if all other prongs had been met. This determination is not dispositive of the question of whether FWF is entitled to intervene in this instance however, because the association does not meet the first two prongs of the test for association standing.

A. FWF ASSERTS THAT ITS SUBSTANTIAL INTERESTS ARE CONSISTENT WITH LEAF'S

FWF asserts that its statement of substantial interest was consistent with that contained in LEAF's petition and, therefore, that the Prehearing Officer's decision to grant LEAF intervention and deny FWF intervention was arbitrary and capricious. The decision of the Prehearing Officer to allow LEAF to intervene and deny FWF intervention is not "arbitrary and capricious" as alleged by FWF. LEAF's statement of substantial interests alleged that:

> LEAF has a substantial interest in the Commission's determination of need and in securing the environmental and health benefits of increased efficiency in the

> delivery of energy services and increased use of cleaner energy resources to meet energy service needs.

(Petition at 1)

We find that there is no "consistency" between LEAF's statement of substantial interests affected and that provided by FWF which reads as follows:

> FLORIDA WILDLIFE FEDERATION (FWF) is a non-profit Florida corporation with over 13,000 members who reside within the state and whose main purpose is to protect, manage and conserve Florida's wildlife, for the benefit of the people of the State of Florida, the wildlife, FWF and its members. Numerous members of the organization hunt, fish, observe, study and photograph wildlife throughout the state. Approval of the Joint Petition would result in injury or harm to Florida's wildlife population, causing them to decline and not be available for the benefits of FWF and its members as stated further below. FWF and its members are substantially affected by the issues to be determined in these proceedings.

(Petition at 2)

LEAF asserted that its interest in how energy is generated and delivered in Florida would be determined by this proceeding. LEAF's members asserted that they had a substantial interest not only in how electric power is provided and what energy resources are relied upon, but specifically in the possibility of renewable energy. LEAF's concerns are within the purview of Section 403.519, Florida Statutes.

Counsel for FWF asserted in the petition for re-consideration that the mention of conservation measures in Section 403.519, Florida Statutes, requires us to determine whether or not siting a power plant would have a deleterious effect upon wildlife and wetlands. Not only would the

exercise of such authority be outside of our jurisdiction and expertise, it misconstrues the statute. Contrary to FWF's arguments, this section has nothing to do with protecting wildlife or wetlands. The conservation discussed in Section 403.519, Florida Statutes, is meant to encourage utility "avoided units," or units which may not have to be built by a utility because that utility implemented demand side management (DSM) or other programs to reward consumers for installing energy-saving equipment or using load management to reduce the consumption of electricity.

III. CONCLUSION

In sum, FWF has not shown that we based our decision to deny FWF intervenor status on a mistake of law or fact or upon inadvertence. FWF has not shown any changed circumstances which would require a reconsideration of the Order Denying Intervention. FWF has not shown that it meets the test for standing to be allowed to intervene in this proceeding. It has alleged an interest that is remote and speculative. It has not demonstrated that it or its members will suffer immediate injury in fact sufficient to entitle it to a Section 120.57, Florida Statutes, hearing. Further, it has not shown that the injury it alleges that it will suffer is of the nature or type which these proceedings are designed to protect. As an association, FWF has not shown that its members have a zone of interest personal to them that would be invaded and rise to the substantial interest test, or that the need determination decided in this case is within the association's general scope of activities.

We do not believe that FWF has shown that its substantial interests are consistent with LEAF's. As discussed herein, we find that it was not arbitrary and capricious for us to deny intervention to FWF and to grant it to LEAF when LEAF specifically alleged that both it and its members had a substantial interest in how energy is generated, and delivered

and whether renewable energy sources are advocated. FWF alleged no interest in the generation of electric energy, only an interest in protecting wildlife for the benefit of its members and Florida's citizens. This interest is not determined in this docket, but before DEP in a further proceeding on the need determination.

Therefore, Florida Wildlife Federation's Petition for Reconsideration of Hearing Officer's Order Denying Intervention is hereby denied.

MOTION TO STRIKE ADDITIONAL AUTHORITY

On February 5, 1999, Florida Power & Light Company filed a Motion To Strike "Additional Authority" Letter and Attachments filed by Joint Petitioners in this docket. As grounds for its motion, FPL stated that the letter, which was filed in response to staff counsel's question posed at oral argument in this docket on January 28, 1999, is an improper rebuttal or reply brief not authorized by the procedural rules or the procedural orders of this case. As authority, FPL cites Rule 28-106.215, Florida Administrative Code. FPL also states that the letter and attachments are improper ex parte communication to the staff that is not cured by providing notice and a copy of it to the parties.

On February 12, 1999, the Joint Petitioners filed a Response In Opposition To FPL's Motion to Strike. Pursuant to Rule 1.140(f), Florida Rules of Civil Procedure, the Joint Petitioners alleged that the motion was inappropriate and that it was not an improper ex parte communication.

Upon consideration, FPL's Motion To Strike Additional Authority is granted. Rule 1.140(f), Florida Rules of Civil Procedure is not applicable in this instance. The Order Establishing Procedure, Order No. 98-1183-PCO-EM, issued September 4, 1998, as amended *ore tenus* during a continuance of the proceeding, governs the posthearing

procedures and posthearing filing dates. The Order is controlled by Rule 28-106.215, Florida Administrative Code and does not provide for filings out of time. The deadline for filing posthearing submissions was January 19, 1999. Thus, the additional authority letter and attachments are untimely and shall be stricken from the record of this proceeding.

NEED FOR THE PROPOSED POWER PLANT

I. INTRODUCTION

Section 403.519, Florida Statutes, enacted in 1980 as part of FEECA, established this Commission as the exclusive forum for determining the need for an electrical power plant subject to the PPSA. The statute requires us to take into account the following criteria in making a determination of need as part of the plant siting process:

1) The need for electric system reliability and integrity;

2) The need for adequate electricity at reasonable cost;

3) Whether the proposed plant is the most cost-effective alternative available;

4) Conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant; and

5) Other matters within its jurisdiction which it deems relevant.

In evaluating a need determination petition, we must take into account all of the above listed criteria. We may base our determination of need for an electrical power plant on a single criterion or any combination of the above criteria. As set forth in Section VI, A below, many times in the past, we have

approved need determination petitions on bases other than strict reliability need.

Our underlying policy in deciding need determination petitions is to protect electric utility ratepayers from unnecessary expenditures and ensure a safe reliable grid. In approving the proposed plant, we are effectuating our longstanding policy. Duke New Smyrna, as proposed, would be a wholesale provider of electricity. Retail utilities, with the obligation to serve, may purchase from Duke New Smyrna, if it is economic to do so. The Project provides a choice to retail utilities in meeting the needs of their customers. If a retail utility purchases from Duke New Smyrna, those retail customers would realize economic benefits due to the existence of the Duke New Smyrna project.

Furthermore, there is sufficient record evidence before us to determine that the statutory criteria required by Section 403.519, Florida Statutes, have been met. This Project is the most cost-effective alternative available to meet both Duke New Smyrna's and the City's need. We find that we have sufficient information to assess the need for the proposed power plant under the criteria set forth in Section 403.519, Florida Statutes. We address each of the five statutory criteria.

II. THE NEED FOR ELECTRIC SYSTEM RELIABILITY AND INTEGRITY

Both the City and Duke New Smyrna presented extensive testimony pertaining to the need for electric system reliability and integrity as required by the statute.

A. THE CITY

The City's 1998 summer peak demand was 78 MWs. By the year 2008, the City's peak summer demand is expected to grow to 98 MWs. The City's generating resources currently

consist of 31.5 MWs of City owned generating capacity (19 MWs diesel, 7.1 MWs of St. Lucie #2 nuclear, and 5.4 MWs of Crystal River Unit 3 nuclear), and 83 MWs of purchase power for a total of 114.5 MWs. The City's 83 MWs of purchased power is obtained through contracts with FPC, TECO, and Enron. These contracts are to expire between September 1999 and 2004. Without these contracts, the City's resources (31.5 MWs) are less than half of its current retail demand (78 MWs).

The City has a well-defined need for energy and capacity to serve its native retail load. The City must acquire additional resources in order to provide adequate service to its retail customers. The record reflects the 30 MW entitlement is necessary for the City to continue to serve its native retail load in an efficient and cost-effective manner. We find that the participation agreement is a legally binding agreement between Duke New Smyrna and the City which identifies a megawatt entitlement of the proposed plant, and a price per megawatt-hour at which the City will pay for the energy from the proposed plant. Even with the 30 MW entitlement from Duke New Smyrna, however, the City must continue to plan for additional capacity on its system.

The Participation Agreement with Duke New Smyrna entitles the City to 30 MWs of capacity to replace part of the City's need for capacity beginning in November 2001. The Participation Agreement is the result of a business arrangement between Duke New Smyrna and the City. Pursuant to the contract, the City agreed to:

1) Furnish the site to Duke New Smyrna;

2) Furnish an interconnection point for the Project to the City's Smyrna substation; and

3) Provide reuse water from its wastewater treatment plant, and other water requirements.

For these considerations, Duke New Smyrna agreed to:

1) Finance, design, construct, own and operate the Project;

2) Grant a 30 MW entitlement of the Project's capacity to the City; and

3) Price energy to the City from its 30 MW entitlement at $18.50/MWH.

B. DUKE NEW SMYRNA AND PENINSULAR FLORIDA

The FRCC approved a 15 percent reserve margin as suitable for Peninsular Florida reliability. We are currently reviewing this level of reserve margin in Docket No. 981890-EU. The utility intervenors argued that because Peninsular Florida reserve margins are forecasted to be at or above the FRCC's threshold, the Project is not needed for peninsula reliability. Based on the testimony of Witness L'Engle, however, past peninsula reserve margins of between 20 and 25 percent did not prevent the loss of firm load. In Order No. 22708, issued March 20, 1990, in Docket No. 900071-EG, we determined that during the Christmas freeze of 1989, sustained low temperatures combined with unit outages, resulted in the loss of firm load in certain areas of the State. Witness L'Engle characterized the currently planned reserves of Peninsular Florida as being "on the edge" and suggested that additional capacity would be beneficial to Florida, but that existing utilities are unwilling to make the investment due to cost and competitive pressures.

The Project will provide benefits to Peninsular Florida's operating reliability. Joint Petitioners' Witnesses Vaden, Green and Nesbitt addressed projected peninsular reserve margins, and the opportunity for wholesale sales in Florida. Currently, Florida utilities must maintain, on an hour-by-hour basis, reserves to replace the state's largest unit,

approximately 900 MW. The addition of the Project is likely to improve the state's ability to meet its operating reserves. The capacity should be considered for hourly and short term operating reserves, but not for long term planning reserve margins, unless contracted for. Duke New Smyrna and its shareholders will finance and own the Project, as well as carry the risk of that investment. Duke New Smyrna will, therefore, have an economic incentive to be available as much as necessary in order to remain economically viable. This economic incentive is greater during peak periods or times of emergency because utility incremental fuel costs tend to be higher during these periods.

Utility intervenors argued that there are no assurances that Duke New Smyrna would not sell all or a portion of its merchant capacity out-of-state. Joint Petitioners' Witness Green did acknowledge that under certain circumstances, power sales to the north could occur. Record evidence establishes, however, that a significant amount of the power from the Project will be sold to Peninsular Florida utilities. Generation costs are lower in the Southern Company region compared to Florida. As such, the probability of sales to Georgia is reduced. As a long term business strategy, we believe that it makes no sense for Duke New Smyrna to sell power out-of-state because those sales would have to overcome the costs of natural gas transportation to the site and wheeling costs for transmission out-of-state.

Whether Duke New Smyrna makes in-state or out-of-state sales, those sales would be at market based rates. A Florida retail IOU, on the other hand, would have to charge cost based rates for in-state sales. We plan to address this disparity whereby some utilities are allowed to charge wholesale market prices while other utilities cannot in an upcoming workshop, as discussed in the last section of this Order.

Based on the record, we believe that the capacity from the Project is needed by the City to continue to serve its retail customer loads. Without the entitlement, we believe that the City would either have to purchase or build capacity at a much greater cost to its ratepayers, or seriously compromise its reliability. Further, the entitlement promotes the integrity of the City's system by allowing for adequate electricity to meet retail demand at a reasonable cost. We believe that the Participation Agreement as well as the testimony and exhibits of Witness Vaden sufficiently demonstrate the need for the 30 MW entitlement. We are persuaded that the entire 514 MWs are what make the 30 MWs entitlement cost-effective, and the entire project is, therefore needed for New Smyrna Beach's system reliability.

III. THE NEED FOR ADEQUATE ELECTRICITY AT A REASONABLE COST

The reliability and integrity of the City's system will be greatly enhanced by the proposed Project. The Project will, by providing needed reliability, also give the City adequate electricity at a reasonable cost. The 514 MWs are what makes the 30 MWs cost effective. In other words, the low-cost power provided to the City is contingent upon the entire Project being constructed. As such, if the Project is not constructed, the City will have to construct or contract for higher cost capacity and energy.

A. THE CITY

Witness Vaden testified that Duke New Smyrna's price of $18.50 per MWH is much lower than other purchase power contracts. For example, the City's existing contract for base load capacity with TECO is at $25 per MWH. The City's cost-benefit analysis provided by Witness Vaden showed a savings of approximately $3.1 million per year net present value for the first ten years, and approximately $7.75 million net present value for the following ten years, for a total

estimated savings of approximately $39 million net present value.

The record supports the conclusion that the purchase of energy from the Project will be the most cost-effective alternative for the City to meet its needs for energy and capacity. The 30 MW entitlement to the City is contingent upon the entire 514 MW Project being constructed. Thus, the Joint Petitioners have shown a need based upon economics. As such, if the Project is not constructed, the City will have to construct or contract for higher cost capacity and energy at a greater cost to its retail ratepayers. No party to this proceeding challenged the validity of this evidence.

B. DUKE NEW SMYRNA AND PENINSULAR FLORIDA

Duke New Smyrna, which is an EWG and not a QF, does not have the legal right to require utilities to purchase its plant output. No utilities and no ratepayers will be obligated to purchase from the Project. No purchase power agreement for long-term firm sales, therefore, is necessary for us to consider in order to approve Duke New Smyrna's Project. The "bidding rule," Rule 25-22.082, Florida Administrative Code, requires that an investor-owned utility evaluate supply-side alternatives in order to determine that a proposed unit, subject to the PPSA, is the most cost-effective alternative available. If Duke New Smyrna were to construct the Project, it could propose to meet a utility's need pursuant to the bidding rule, but the IOU would have the final decision on how it would meet its needs. An IOU, or any other utility in Florida should prudently seek out the most cost-effective means of meeting its needs. The Duke New Smyrna project simply presents another generation supply alternative for existing retail utilities. Florida ratepayers will not be at risk for the costs of the facility, unless it is proven to be the lowest cost alternative at the time a contract is entered. Retail ratepayers

will only be obligated for the term of any contract, and not the full economic life of the facility.

Duke New Smyrna, as an EWG, can contract with utilities on a long term basis (equal to or greater than one year), or on a short term or on an hourly, as-available basis. All IOU purchases will be subject to our approval in our ongoing purchased power cost recovery docket. If Duke New Smyrna were to sign an as-available contract, the utility would be expected to pay no more than its avoided energy cost. In other words, Duke New Smyrna will be compensated no more than the utility's cost of producing the next increment of electricity, essentially fuel and variable operating and maintenance costs. The utility's ratepayers would be indifferent to a transaction which was priced at incremental cost because it would be cost neutral and, therefore, there would be no adverse consequences to the utility's retail customers. Retail customers would realize benefits if the negotiated price was less than the utility's incremental cost. This analysis also applies if Duke New Smyrna were not proposing to commit any of the Project's capacity to a utility.

We approve the Project because Duke New Smyrna has shown an economic need for the Project. Retail customers are not at risk, and we do not have to determine and assess the avoided costs of a proposed unit over several decades where changes in the world economy, changes in generation efficiencies, and changes in the cost of fuel can render decisions uneconomic in the future which were projected to be economic when made. In this case, the market will determine whether or not Duke New Smyrna's decision to use natural gas continues to be economic over the next several decades with all of the risk borne by Duke New Smyrna and its shareholders. We find this Project to be a benefit to the ratepayers of this state.

Duke New Smyrna, as proposed, would be a wholesale provider of electricity. Retail utilities, with the obligation to

serve, may purchase from Duke New Smyrna, if it is economic to do so. The Project provides a choice to retail utilities in meeting the needs of their customers. If a retail utility purchases from Duke New Smyrna, those retail customers would realize economic benefits due to the existence of the Duke New Smyrna project. Ratepayers will continue to be protected against uneconomic utility decisions by our ongoing audits and review of purchased power contracts of retail-serving investor-owned Florida utilities. The fact that the proposed plant is completely financed by Duke New Smyrna at no cost to retail ratepayers, leads us to believe that the Project is good for the City's retail ratepayers and that it is also economically good for the state as a whole.

Duke has demonstrated that its plant may lower wholesale electric prices paid by retail-serving utilities. This does not mean that subsequent merchant plants will be able to demonstrate that they will do the same. Merchant plant applicants do not have a right to build merchant plants in Florida. Each applicant must demonstrate that its project conveys a benefit to Florida ratepayers, given the existence of the prior power plant additions. We recognize that there may be certain applications in the future, which may fail to demonstrate an economic need, despite the fact that the retail ratepayers are not at risk. This demonstration may involve the inability of the applicant to demonstrate that it will dispatch within the Florida grid. We also recognize that there may be certain times when a proposed plant could adversely effect the reliability of the Florida grid. This could involve a plant, by its proposed location within the Florida grid, which degrades the transmission system within Florida. The record in this case, however, is devoid of such concerns.

IV. PROPOSED PLANT IS THE MOST COST-EFFECTIVE ALTERNATIVE AVAILABLE

Based on the evidence adduced at hearing, we find that the Project is the most cost-effective alternative to the City for its 30 MW entitlement, and to Duke New Smyrna in making wholesale sales to Peninsular Florida. The utility intervenors argued that, absent a power sales agreement to meet a utility specific kilowatt need, no comparison can be made to determine whether the Project is the most cost-effective alternative. We disagree.

The record shows that the City evaluated numerous alternatives in choosing Duke New Smyrna. Duke New Smyrna was shown to be the most cost-effective option for the City. If the plant is not constructed, the City will have to find more expensive power either by contract or construction. This will adversely impact the City's ratepayers.

Need may be shown by a petitioner based either on economics or reliability. In this case, the Joint Petitioners have demonstrated need based largely on economics. They have demonstrated in the record that by participating in the entitlement, the City will save $39 million over the life of the entitlement when the cost of purchased power from Duke New Smyrna is compared to the cost of purchased power at the rates the City is currently paying. No party to this proceeding challenged the cost-effectiveness of this plant.

A. THE CITY

Evidence was presented that the price for the associated energy from the Project will be $18.50/MWH subject to adjustments detailed in the Participation Agreement. The City compared this price with its existing contracts to show the Duke New Smyrna purchase to be cost-effective.

In its analysis of the projected savings from the Participation Agreement, Witness Vaden testified that the

City used an escalation rate of 3.4%. This escalation rate was based on FPC's rate, as well as the City's past increases. Witness Vaden characterized the escalation rate as "extremely conservative." In addition, the City calculated the net present value of the annual savings of the project using a discount rate of 6% for the years 2002 to 2021, to arrive at the net present value savings. This discount rate is consistent with the most recent interest rates reflected in the Federal Reserve Statistical Release.

The financial and economic assumptions underlying the project were not challenged by other witnesses. Accordingly, based upon the representations and analyses provided by witness Vaden, the project's financial and economic assumptions appear reasonable for planning purposes.

The City also considered other alternatives to its 30 MW entitlement of the Project. In 1993, General Electric performed an analysis of future self-build power supply options for the City. As a result of that analysis, an approximately 40 MW gas-fired unit was recommended. The City relied on this study in determining that the 30 MW Duke New Smyrna purchase was the most cost-effective alternative. The City also considered purchasing from the FMPA, but determined it not to be economical compared with the Duke New Smyrna purchase.

The City is not required, nor did it elect to issue a request for proposals to solicit supply-side alternatives. Witness Vaden, however, offered that once Duke New Smyrna offered its price to the City, the $18.50 per MWH offered price was so much lower than other purchase power contracts, specifically its contract for base load capacity with TECO at $25 per MWH, we believe that the decision to choose Duke New Smyrna's offer was clearly the most economical.

B. DUKE NEW SMYRNA

Duke New Smyrna, and entities acting on its behalf, evaluated alternative generating technologies before selecting the natural gas-fired combined cycle unit for the Project. Duke New Smyrna stated that the direct construction cost of the Project will be $160 million, but did not provide specific cost breakdowns for proprietary reasons. Duke New Smyrna is willing to invest $160 million of its shareholders' money on the belief that it can generate and sell its power below current wholesale prices. This contrasts with other need determinations where long-term forecasts of generation and fuel were made. Florida retail customers will not be obligated through their retail-serving utilities to pay for the $160 million plant through their rates. In addition to lower cost electricity for the ratepayers of the City, other benefits include approximately twenty jobs when the plant is operational and property taxes.

C. PENINSULAR FLORIDA

As noted above, relying on the *Nassau* decisions, the utility intervenors argued that because there is no power purchase agreement for the merchant capacity, no utility specific kilowatt need can be met, and, we cannot determine whether the Project is the most cost-effective alternative. The distinctions between Duke New Smyrna and QFs make the need for a power purchase agreement in this case moot. A power purchase agreement with a utility assumes a commitment on the part of the utility's ratepayers which binds them to supporting all or a portion of the costs of generation. Duke New Smyrna, however, will internally finance the costs of the Project. No utilities and no ratepayers will be obligated to purchase from the Project.

Rule 25-22.082, Florida Administrative Code, the "bidding rule," requires an IOU to evaluate supply-side alternatives in order to determine that a proposed unit, subject to the PPSA,

is the most cost-effective alternative available. Duke New Smyrna could propose to meet an IOU's need pursuant to the bidding rule, but the IOU would have the final decision on how it would meet its needs. An IOU, or any other utility subject to Commission cost-recovery in Florida should prudently seek out the most cost-effective means of meeting its needs. The Duke New Smyrna project presents another alternative for existing utilities, without putting Florida ratepayers at risk for the costs of the facility as is done for the costs for rate based power plants.

As stated above, the Project will be economic for other Florida retail customers, because Duke New Smyrna will operate the plant as a merchant plant. Merchant plants increase wholesale competition thereby in theory lowering wholesale electric prices from what they otherwise may be. Merchant power plants do not sell to retail customers in Florida. No Florida retail customers are obligated to bear the costs of this project in rate base.

We believe that the criteria to be considered pursuant to the PPSA give us the flexibility to approve power plants based on reasons other than simple kilowatt need. As previously discussed, we believe that the 30 MWs entitled to the City are needed and are cost-effective to the City only because of the remaining 484 MWs of the Project. We heard extensive testimony at the hearing concerning the cost-effectiveness of this Project. We also heard testimony concerning when and how the Project's capacity and energy will be dispatched, i.e. sold within the Florida grid. The evidence in the record shows this plant, because of its efficiencies, will be dispatched a great deal of the time. However, because of its merchant nature, it will only be dispatched when it is economical to do so. As a result, we believe that it will exert a downward pressure on electricity pricing in the wholesale power market in Florida. This, in turn, will flow through to retail IOU customers in retail rates through the fuel

adjustment clause. Therefore, we believe that the record evidence shows other Peninsular Florida utility ratepayers will benefit from the 484 MWs which will add to grid reliability, and displace higher cost fuels.

V. CONSERVATION MEASURES TAKEN OR REASONABLY AVAILABLE

With respect to conservation measures, Section 403.519, Florida Statutes states:

> The commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant . . . .

A. THE CITY

Witness Vaden stated in his direct testimony that the City plans to construct a 150 kW solar photovoltaic generating station on a site adjacent to the Duke New Smyrna Project in 2001 or 2002. The City plans to offer a "green pricing" program once the facility comes into service. City customers would be given the option of having their electric rates based on the power generated by the solar photovoltaic facility. The record is unclear whether approval of the Duke New Smyrna Project is a condition precedent to construction of the City's 150 kW solar photovoltaic facility. If the facility is constructed, however, it will advance the state's policy goals of encouraging the development of renewable energy resources, as required by Section 366.81, Florida Statutes.

Solar photovoltaics are not the City's only option for conservation. According to the record in this proceeding, the City currently offers load management and energy audits to customers. Peak demands can be reduced by approximately ten percent.

B. DUKE NEW SMYRNA AND PENINSULAR FLORIDA

With respect to Duke New Smyrna, we believe, as does LEAF, that the wholesale nature of the merchant portion of the Project limits its conservation obligations. The PPSA contains five criteria for us to consider. As discussed previously in this order, we have granted need determinations on other than kilowatt need, as evidenced in the oil-backout cases of the 1980s.

VI. OTHER MATTERS WITHIN OUR JURISDICTION WHICH WE DEEM RELEVANT

We agree that this case is not as straightforward as a conventional need determination involving a vertically integrated monopolistic electric utility seeking to provide additional generation resources to meet its native retail kilowatt need within its retail service territory. Nevertheless, it is not so unusual as to be unique within the twenty-six year history of Commission need determination proceedings under the Florida Power Plant Siting Act. We have historically analyzed and quantified a wide range of reliability, economic, and socio-economic factors affecting the need for power in the State of Florida. The *Nassau* cases, on which the utility intervenors focused, were but two of many cases in which we dealt with unique and challenging issues affecting need. We believe that our approach and findings in each of these cases has a bearing on how "need for power" should be assessed in this case.

The PPSA, enacted in 1973, and amended many times since, requires electric generating facilities with steam cycles of 75 MW or greater to be certified by the Governor and Cabinet. The PPSA does not apply to facilities with steam cycles less than 75 MW, combustion turbines, or repowerings where there is no increase in steam capacity. The record evidence is that, except for new steam-cycle 75 MW and

above, merchant power plants can and are being built in Florida. Some of these power plants are not as efficient as combined cycle power plants such as Duke New Smyrna. Evidently, these less efficient merchant power plants are being built without a steam cycle in order to avoid the PPSA. Approving Duke New Smyrna sends a signal that Florida wants efficient and clean power plants. It also allows us to require all power plants to be subject to the Grid Bill. This is important so that we can require coordination through the FRCC in matters such as relaying, transmission use, spinning reserve, and capacity and fuel use reporting. Otherwise, it is unclear whether we can require non-PPSA covered merchant power plants to belong to and participate in the FRCC.

A. NEED DETERMINATION ON OTHER THAN KILOWATT NEED AND RELIABILITY

The following excerpts from some of our Orders highlight the fact that we have previously approved power plants based on other than kilowatt need:

In granting JEA/FPL's application of need for St. John's River Power Park Units 1 and 2, we stated:

> *We construe the "need for power" issue to encompass several aspects of need.* In our evaluation of the need for SJRPP Units 1 and 2 and related facilities, we have considered the principal areas of the electrical *need for additional capacity* to insure an adequate supply of bulk electrical power and energy to electric consumers and the *economic need* of providing this bulk power and energy at the lowest possible cost. In addition, the *socio-economic need* of reducing the consumption of imported oil in the State of Florida has been considered. *Each of these aspects of need for SJRPP 1 and 2 was evaluated with respect to the electrical consumers of JEA, FPL, and peninsular Florida as a whole.* (Order

No. 10108, June 26, 1981, Docket No. 810045-EU, p. 2) (emphasis added)

We further stated:

> Should the Commission's FEECA goals governing the growth of seasonal kilowatt demand be achieved, and we are of the opinion that they can reasonably be achieved, *additional generating capacity for the purpose of insuring adequate supplies of power and energy to peninsular Florida electric consumers does not appear to be required until 1991.* Similarly, *JEA and FPL do not appear to require additional generating capacity for reliability purposes until 1991 and 1989 respectively,* should they achieve their respective FEECA seasonal kilowatt demand goals. Thus, the salient issue is the determination of the need for SJRPP Units 1 and 2 with in-service dates of December, 1985, and May 1987, respectively is *whether the construction of these units in the time frame proposed represents the lowest cost alternative available to the continued use of expensive oil-fired generation in Peninsular Florida, and in the areas served by JEA and FPL.* (Order No. 10108, June 26, 1981, Docket No. 810045-EU, p. 2) (emphasis added)

In granting OUC's petition for certification for Stanton Unit 1, we stated:

> The FCG study concluded that while the proposed Stanton Unit will undoubtedly enhance the adequacy and reliability of the Bulk Power Supply System, *the facility does not appear to be needed for peninsular-wide reliability purposes during the 1980's.* (Order No. 10320, October 2, 1981, Docket No. 810180-EU, p. 3) (emphasis added)

We further stated:

> Even though the Stanton Center is not required in the 1980's to meet the peninsula's capacity needs, *the project will provide significant economic benefits for peninsular Florida* in terms of supplying an alternative to oil-fired capacity generation. (Order No. 10320, October 2, 1981, Docket No. 810180-EU, p. 3) (emphasis added)

In approving Metropolitan Dade County's petition for an expansion of its existing solid waste facility, we stated:

> In determining the need for a solid waste facility, the Commission also considers Section 377.709, Florida Statutes, which provides that: "...the combustion of refuse by solid waste facilities to supplement the electricity supply not only represents an effective conservation effort but also *represents an environmentally preferred alternative* to conventional solid waste disposal in this state." (Order No. PSC-93-1715-FOF-EQ, November 30, 1993, Docket No. 930196-EQ, p. 2) (emphasis added)

We further stated:

> Energy generated by Dade County's expanded facility will meet two needs: *displace fossil fuels* and reduce the amount of garbage through combustion of solid waste. The new boiler is expected to provide an additional 140 gigawatt-hours (GWh) per year assuming an 80% capacity factor. Since the facility is located in Florida Power and Light Company's service territory, Dade County will likely sell the energy to FPL. Since there is no contract to sell firm capacity, the Dade County facility will likely sell energy on an as-available basis to FPL; this energy will displace fossil fuels in Florida. We find that the state has a need for the additional energy to be generated from Dade County's expanded

solid waste facility. (Order No. PSC-93-1715-FOF-EQ, November 30, 1993, Docket No. 930196-EQ, p. 3) (emphasis added)

In approving Florida Crushed Stone Company's petition for determination of need, we stated:

> However, significantly different issues are raised when a private entity, such as FCS, proposes to build a cogeneration facility . . . Thus it has been governmental policy to encourage cogeneration both because it makes more efficient use of energy resources and because it may *lessen the need for public utilities to build additional generating facilities . . . we have decided that additional criteria relating to fuel efficiency should be used to evaluate the application of FCS.*
>
> . . . We find that the addition of 125 MW of generating capacity will *enhance system reliability and integrity simply because it will increase the diversity of generating sources*; however, this benefit cannot be quantified, and we view it as a minor, but desirable, result of constructing the proposed plant.
>
> . . . Thus, if FCS receives full avoided costs for the energy it produces, it will have no impact on the cost of electricity to FPC's ratepayers.
>
> . . . the need for additional capacity is irrelevant to a determination of need such as this . . .
>
> . . . our finding that the proposed plant will have essentially no impact on the need for an adequate supply of electricity at a reasonable cost is expressly based on the premise that *neither the FERC nor the Commission's Rules would require a utility to compensate a QF for any cost associated with either energy or capacity when no energy is purchased or capacity costs are avoided by the utility.*

> Based on this record, we find that the proposed cogeneration facility can be expected to achieve a desirable level of fuel efficiency both because it will use energy that otherwise would be wasted either in the power production or cement manufacture processes and because it will *produce electricity at a fuel efficiency level that compares favorably to the fuel efficiencies achieved by public utilities.* (Order No. 11611, February 14, 1983, Docket No. 820460-EU, pp. 2-5) (emphasis added)

The utility intervenors argued that building 514 MWs when only 30 MWs are needed was a sham transaction. We disagree. As previously discussed, for cost-effective oil-backout purposes with zero kilowatt need, approximately 2000 MWs were approved. The recommended 514 MWs with 30 MWs of kilowatt need comports with our oil-backout decisions.

B. THE POLICY ISSUES IN THE *NASSAU* CASES

The utility intervenors cited the *Nassau I* and *II* orders as their primary argument in opposition to the Project. The legal aspects of this argument are discussed in Section I above, however, here we will discuss the underlying policy of these decisions. Nassau was a qualifying facility under PURPA. QFs have been given a special status by PURPA which requires a utility to purchase QF plant output at the utility's avoided cost.

The question presented in the *Nassau* cases is different from the questions presented in this proceeding. In this docket, we have not been asked to determine the need for a QF that seeks to bind a utility's ratepayers for the cost of an avoided unit over several decades. That was the issue in the *Nassau* cases. Here, we are determining the need for a merchant plant which does not seek to bind utility ratepayers

to bear the cost of an avoided unit. We believe that because of this distinction between the present case and the *Nassau* cases, the *Nassau* cases are inapplicable.

Nassau had a standard offer contract based on a statewide avoided unit, and petitioned for a determination of need. Consistent with our underlying policy of protecting utility ratepayers from unnecessary expenditures, we compared the costs of the statewide contract to the avoided costs of FPL, which was the proposed purchasing utility. We found that the project was not the most cost-effective alternative to FPL, and the need was denied.

In *Nassau II*, Nassau petitioned for a determination of need for a project without a signed power sales agreement. Utilities would have been required to purchase the capacity and energy from Nassau's proposed project, because Nassau was a QF. Consistent with our underlying policy of protecting utility ratepayers from unnecessary expenditures, we thought it wise to know the purchase power costs prior to obligating utility ratepayers for these costs over a long term. Nassau's petition was dismissed for lack of a purchase power agreement. In summary, we believe that *Nassau I* and *II* apply to QFs only and do not require utility specific kilowatt need for this Project.

As outlined above, the Joint Petitioners have presented all of the information required by Section 403.519, Florida Statutes, and Rule 25-22.081, Florida Administrative Code. The Joint Petitioners have shown that there is a reliability need for 30 MW of the proposed plant's capacity for the City and an economic need for the remaining 484 MW. Even if Duke New Smyrna had come in for a need determination on its own without the City, we believe that it is a proper applicant and could have shown an economic need for the proposed plant. Accordingly, granting the determination of need requested by the joint petitioners is consistent with the public interest and the best interests of electric customers in

Florida. All of the statutory criteria have been met by the Joint Petitioners. Therefore, we grant the Joint Petition for a determination of need.

FURTHER PROCEEDINGS CONSISTENT WITH THIS DECISION

In granting this petition, we understand that questions will arise about the number of merchant plants needed in Florida. We will hold a workshop subsequent to the closure of this docket in order to discuss issues related to the selection and siting process for future merchant plants choosing to locate in Florida. We note that the question of reserve margins is scheduled to be addressed in Docket No. 981890-EU, with hearings scheduled for September 22-23, 1999. Witness L'Engle testified, as a daily electric utility dispatcher, the FRCC's 15 percent planned reserve margin is "on the edge." He stated he would be more comfortable with a 20 percent reserve margin, but suggested that utilities are unwilling to increase reserves due to cost and competitive pressures. This suggests that a controlling reserve margin cap could be used as a guide to merchant plant entrance into the Florida wholesale power market. This issue will be evaluated as part of the workshop or rule-development proceedings.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Florida Power & Light Company's Motion to Dismiss Joint Petition and Florida Power Corporation's Motion to Dismiss Proceeding are denied. It is further

ORDERED that the Florida Wildlife Federation's Petition for Reconsideration of Hearing Officer's Order PSC-98-1598-PCO-EM Denying Intervention is denied. It is further

ORDERED that Florida Power & Light Company's Motion to Strike "Additional Authority" Letter is granted and the Additional Authority Letter filed by the Joint Petitioners is stricken from the record. It is further

ORDERED that the Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., is granted. It is further

ORDERED that this docket shall be closed after the time for the filing of an appeal has run.

By ORDER of the Florida Public Service Commission this 22nd day of March, 1999.

/s/ Blanca S. Bayó
BLANCA S. BAYÓ, Director
Division of Records and Reporting

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-850-413-6770.

(SEAL)
LJP/GAJ

DISSENTS

COMMISSIONER CLARK:

I dissent from the majority's decision to deny the Motions to Dismiss filed by Florida Power and Light Company (FPL) and Florida Power Corporation (FPC). Neither the legislative history of the Power Plant Siting Act, nor the logic and legal analysis of the majority's decision convinces me that Duke New Smyrna is a proper applicant for a determination of need. The Motions to Dismiss should be granted because

Duke New Smyrna is *not* a proper applicant under Section 403.519, Florida Statutes.

The majority concludes that Duke New Smyrna is a "regulated electric company" and is therefore included in the definition of "applicant" in Section 403.503(13), Florida Statutes, which in turn applies to Section 403.519, Florida Statutes.[6] Close inspection of legislative history and case law refutes this conclusion.

The Power Plant Siting Act was first enacted in 1973. The legislative intent for the Act recognized the need for a statewide perspective on the selection and utilization of sites for generating facilities given the "significant impact upon the welfare of the population, the location and growth of industry and the use of the natural resources of the state." 1973 Fla. Laws Section 1, Chapter 73-33. Initially, the Commission's role was simply to prepare a "report and recommendation as to the present and future needs for electrical generating capacity in the area to be served by the proposed site . . ." 1973 Fla. Laws Section 1, Chapter 73-33.

Then, in 1980, as part of the Florida Energy Efficiency and Conservation Act (FEECA), the Legislature changed the requirement of a "report and recommendation" to a proceeding resulting in a determination of need. Because of the rapid rise in the cost of electric power production resulting from the dual impact of inflation and effects of the Arab Oil Embargo, the Legislature found it in the public interest to vigorously pursue energy efficiency and conservation measures. The Legislature gave the Com-

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[6] I do agree with the majority's conclusion that in order for a determination of need to issue for this project, Duke New Smyrna must, in its own right, be an applicant under Section 403.519, Florida Statues. The 30 MW earmarked for the City of New Smyrna, an entity that does fall within the definition of applicant, is insufficient to justify applicant status for the entire 514 MW project.

mission the responsibility of requiring utilities to pursue energy efficiency and conservation to reduce growth rates of consumption. As part of the responsibility to encourage energy efficiency and conservation, the Legislature required the Commission to increase its scrutiny of the need for prospective power plants. The Commission was directed to review proposed new plants to ensure that they were needed for system reliability and integrity, that their cost was reasonable and cost effective, and that the utility had undertaken all conservation measures that could reasonably be employed to mitigate the need for the new plant. 1980 Fla. Laws Section 5, Chapter 80-65.

The provision in FEECA that identified the Commission as the exclusive forum for a determination of need used the term "utility" and "applicant" interchangeably.

366.86 Exclusive forum for determination of need.—

(1) On request by a *utility* or on its own motion, the Commission shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act. The Commission shall be the sole forum for the determination of this matter, which accordingly shall not be raised in any other forum or in the review of proceedings in such other forum. In making its determination, the Commission shall take into account the need for electric system reliability and integrity, the need for adequate reasonable cost electricity and whether the proposed plant is the most cost effective alternative available. The Commission shall also expressly consider the conservation measures taken by or reasonably available to the *applicant* or its members which might mitigate the need for the proposed plant and other matters within its jurisdiction which it deems relevant. The Commission's determination of need for an electrical power plant shall create a presumption of public need and

necessity and shall serve as the Commission's report required by s. 403.507(1)(b).[7]

The term "utility" was expressly defined for purposes of FEECA, including this section, as "[a]ny person or entity of whatever form which provides electricity or natural gas *at retail to the public*, specifically including municipalities or instrumentalities thereof and cooperatives under the Rural Electrical Cooperative Law; . . . " 1980 Fla. Laws Section 5, Chapter 80-65 (emphasis supplied).

The fact that the term "utility", which is specifically defined in FEECA, is used interchangeably with "applicant" suggests that the two terms mean the same thing. The definition of utility in FEECA encompassed the same entities as the definition of "applicant" in the Power Plant Siting Act. An "applicant" is a "utility" that has applied for a determination of need. One cannot be an applicant under the Power Plant Siting Act without a determination of need from the Commission, and only a utility providing power at retail may apply to the Commission for such a determination.

The conclusion is inescapable. The two definitions mean the same thing. In order for an electric utility to come under Commission regulatory authority (that is, to be a "regulated electric utility"), the sale must be a sale at retail. Wholesale sales are a matter within the sphere of federal regulation.

In 1990, the Legislature enacted numerous revisions to the Power Plant Siting Act, the Transmission Line Siting Act, and other laws affecting environmental regulation. 1990 Fla. Laws Section 24, Chapter 90-33, amended Section 403.519, Florida Statutes, to change the term "utility" in the first

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[7] This statute was originally numbered as Section 366.86, Florida Statutes, when it was created by Section 5 of Chapter 80-65, Laws of Florida. When it was published in the Florida Statutes, it was renumbered as Section 403.519, Florida Statutes. It remains part of FEECA, however, subject to FEECA definitions.

sentence to "applicant." It also required the publication of notice of a request for a determination of need, and provided that the Commission's determination of need constitutes final agency action. There is no indication in either the title of the act, or in the legislative staff analyses, that the amendment was designed to broaden the entities authorized to request a need determination beyond persons or entities providing electricity at retail.

Decisions of the Commission and the Florida Supreme Court subsequent to the enactment of 1990 Fla. Laws Section 24, Chapter 90-331, support the notion that the change to Section 403.519, Florida Statutes, did not mean a broadening of the term "applicant," but rather was further confirmation that an applicant must be an entity obligated to serve retail load. In 1992, Ark Energy Inc. (Ark) and Nassau Power Corporation (Nassau) each filed a petition for a determination of need. In Order No. PSC-92-1210-FOF-EQ, issued October 26, 1996, in Docket Nos. 920769-EQ, 920761-EQ, 920762-EQ, and 920783-EQ, the Commission dismissed the petitions of Ark and Nassau because they were not proper applicants for a need determination under Section 403.519, Florida Statutes. The order points out that the definition of "applicant" in Section 403.503, Florida Statutes, encompasses only entities that may be obligated to serve customers:

> Section 403.503, Florida Statutes, defines "applicant" as an electric utility, and in turn defined "electric utility" as:
>
> > cities and towns, counties, public utility districts, regulated electric companies, electric cooperatives, and joint operating agencies, or combinations thereof, engaged in, or authorized to engage in, the business of generating, transmitting, or distributing electric energy.

> Ark and Nassau do not qualify as applicants. Neither Ark nor Nassau is a city, town, or county. Nor is either a public utility district, regulated electric company, electric cooperative or joint operating agency.
>
> Significantly, each of the entities listed under the statutory definition may be obligated to serve customers. It is this need, resulting from a duty to serve customers, which the need determination proceeding is designed to examine. Non-utility generators such as Nassau and Ark have no such need since they are not required to serve customers. The Supreme Court recently upheld this interpretation of the Siting Act. Dismissal of these need determination petitions is in accord with that decision. *See Nassau Power Corporation v. Beard*, 601 So.2d 1175 (Fla. 1992).
>
> Order No. PSC-92-1210-FOF-EQ, issued October 26, 1992, in Docket Nos. 920769-EQ, 920761-EQ, 920762-EQ, and 920783-EQ, pp. 2-3.

The Florida Supreme Court affirmed the Commission's order dismissing the petitions. *Nassau Power Corporation v. Deason*, 641 So.2d 396 (Fla. 1994). The Court found "construction of the term applicant as used in section 403.519 is consistent with the plain language of the pertinent provisions for the Act and this Court's 1992 decision in *Nassau Power Corp. v. Beard*". (641 So.2d at 398).

The Court also cited favorably the Commission's reasoning that a "need determination proceeding is designed to examine the need resulting from an electric utility's duty to serve customers." (641 So.2d at 398).

The majority distinguishes the present case from *Nassau Power Corp. v. Deason* on the basis that the case involved qualifying facilities (QFs) that were seeking to "require FPL

to purchase their output and bind the retail ratepayer." [8] Staff recommendation at p. 32. The rationale of the *Nassau* case propounded by both the Commission and the Court does not support such a distinction. The rationale focused on the types of entities enumerated in Section 403.503, Florida Statutes, and concluded that the common denominator present in each was an obligation to serve customers. The need to be examined under Section 403.519, Florida Statutes, was a need resulting from the duty to serve those customers.[9]

By seizing on the term "regulated" as including regulation by the FERC (and presumably regulation by any other governmental authority), the Commission is relying on a federal act, not the laws of Florida, for its authority. It is unlikely that the legislature delegated to the federal government the authority to determine who might come within the definition of applicant, but that is precisely the effect of the majority's decision. Duke New Smyrna is an Exempt Wholesale Generator (EWG), a category of electric generators that was created by the Energy Policy Act of 1992.[10] Clearly, this category of generators was not in

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[8] Need determinations do not bind the retail ratepayers, and an order determining a need is not a guarantee of cost recovery from retail ratepayers. If, when, and to what extent cost recovery is authorized is a matter to be resolved when the utility seeks to recover the costs of their investment through a ratemaking proceeding, or seeks approval of costs incurred for a power purchase contract in a capacity cost recovery proceeding. The Power Plant Siting Act specifically acknowledges that the siting and cost recovery are distinct processes. Section 403.511(4), Florida Statutes, provides that: "The Act shall not affect in any way the ratemaking powers of the Public Service Commission under Chapter 366;"

[9] A review of the transcripts from the Agenda Conference where the *Ark* and *Nassau* petitions were discussed likewise does not support the distinction. The focus of the debate was that in order to be an applicant, the entity had to have an obligation to serve retail customers.

[10] A generator desiring status as an EWG must apply to the FERC for

existence when the Power Plant Siting Act was created in 1973. Nonetheless, the majority concludes it is within the definition of applicant because the federal government has subsequently decided to authorize this category of generators.

This Commission has previously tried to rely on federal acts to broaden its authority, and the Florida Supreme Court overturned that decision. In *Florida Power and Light Company v. Florida Public Service Commission*, 5 FALR 227-J (4/4/83), 471 So. 2d 526 (Fla. 1985), the court reversed a decision adopting rules on the purchase of power from cogenerators and small power producers. The adoption of rules was precipitated by the Public Utilities Regulatory Policy Act enacted by Congress in 1978. The act directed FERC to adopt rules encouraging cogeneration but gave the states the task of implementing that policy particularly by setting the price to be paid by utilities for cogenerated energy. The court found the Commission lacked state statutory authority to implement the directives of PURPA.[11]

The need for the Commission to give careful consideration to legislative authority is even more important today given the 1996 amendments to the Administrative Procedures Act. The majority has acknowledged the need to further develop policy with respect to merchant plants. To codify that policy into rules will require specific authority. It will not be enough that the rules are reasonably related to enabling legislation or founded on an expression of legislative intent.

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that designation and sales from the facility are limited to wholesale sales.

[11] The opinion noted the fact that the legislature subsequently provided the authority for rules in this area, but the subsequent enactment did "not breath new life into the already adopted rules." 5 FALR at 228-J, 471 So.2d 526-536 (1985). Upon request of the Court, the opinion was withdrawn from the bound volume of the Southern Reporter and the case was voluntarily dismissed in 1985.

Neither the petition nor the majority's decision complies with the requirements of Section 403.519, Florida Statutes, or our rules implementing Section 403.519, Florida Statutes, regarding the elements that must be considered in finding a need for a plant. This is not surprising since Duke New Smyrna clearly does not fit within the definition of "applicant." Essentially, the majority concludes that with respect to the 30 MW earmarked for the City of New Smyrna, it is cost-effective to the City because of the extraordinarily low price to be paid by the City. This price was characterized by staff in its recommendation and at the Special Agenda as a "loss leader." With respect to the remaining 484 MW, no need must be established because it will only be purchased by those entities having an obligation to serve when it is needed. The majority leaves the determination of need to a later date and to the market.[12]

I agree with the majority that the record in this case demonstrated that there are potentially substantial benefits to be derived from merchant plants such as the one proposed. The record also suggested several issues involved in the decision to introduce pure merchant plants into the power production scheme in Florida. Issues such as the impact on the environment; the impact on conservation goals and programs; the impact on investment in, and operation of,

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[12] In their analysis and in response to questions at Agenda, the staff relies on need cases involving plants designed to replace oil-fired generation as precedent for the analysis of need done in this case. That reliance is misplaced. Those cases also involved consideration of a specific legislative direction to reduce consumption of petroleum fuels. Additionally, the projects were evaluated against other proposals to accomplish reduced consumption of petroleum fuels. They also rely on the Florida Crushed Stone determination of need. However, that case was decided at a time when the Commission had a practice of "presuming need as opposed to determining actual need" and the Florida Supreme Court affirmed the Commission's repudiation of that practice in *Nassau Power Corp. V. Beard*, 601 So.2d 1175 (Fla. 1992).

existing plants; how many merchant plants should be permitted; the criteria for choosing among potential plants if the number permitted is to be limited; the impact on economic development; and diversity of ownership to address market power issues.

I concur in the majority's decision to move quickly to workshops to identify all the issues that need to be addressed regarding merchant plants. However, the fact that these issues arise and that some involve matters beyond the realm of economic regulators is further demonstration that the current regulatory scheme does not contemplate the siting of merchant plants.

Our task in this case was to decide what the law is, not what it ought to be. In my view, the law is clear that Duke New Smyrna is not a proper applicant under Section 403.519, Florida Statutes, and the petition must be dismissed. We should, however, move forward with our workshop so that we can make recommendations to the Legislature as to what the law ought to be.[13]

COMMISSIONER JACOBS:

Opinion of Commissioner Jacobs, dissenting in part and concurring in part:

Having concluded that granting the determination of need petition is not consistent with the public interest, I write to offer views on two issues: (i) whether Duke New Smyrna is a proper applicant under the Power Plant Siting Act; and, (ii)

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[13] This is the proper role for the Commission in the consideration of major changes in the scheme of regulation for a particular industry. This is the procedure we have followed in the telecommunications industry. We first investigated the issues and policy considerations regarding the introduction of competition into the long distance market, the pay telephone market and, most recently, the local exchange market, then made recommendations to the Legislature as to what legislative changes were appropriate.

whether the proposed plant is the most cost effective option for providing 514 MW of capacity.

I agree with the majority that in the instant docket Duke New Smyrna is a proper applicant, although my reasoning differs from that of the majority. More importantly, I have concluded that the determination of need should be denied because I have not been persuaded that the proposed plant is the most cost effective option for providing the 514 MW.

Section 403.519, Florida Statutes holds that on request by an *applicant* or on its own motion, the Commission shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act. While the applicant in this proceeding is a partnership between the City of New Smyrna and Duke Energy, the issue has arisen of whether Duke Energy alone, as an Exempt Wholesale Generator (EWG) could be an applicant.

Initially, I would restrict the determination of standing to the petition as filed, i.e., a request by the partnership to certify need of the full plant capacity. I would not render a decision relative to Duke's standing as an applicant individually, nor would I make a decision on standing by bifurcating the application into the electricity required for the City of New Smyrna and the additional capacity of the plant (which has been dubbed "merchant capacity"). However, to the extent that the issues are addressed by the majority, I believe the holding of the Florida Supreme Court in *Nassau Power Corporation v. Beard* (cited herein as Nassau II), controls. Thus, to be a proper applicant, an EWG must be tied by contract to a co-applicant who is a utility. In the instant docket, Duke New Smyrna is a proper applicant only because of the relationship between the parties to the partnership.

Alternatively, I do not agree, as argued by FPL and FPC, that Nassau II requires Duke New Smyrna to contract with

retail utility providers for the merchant capacity in order to properly make the application for need. There is no precedent for predicating standing in need determinations on the allocation of the need petition among the joint applicants. The exact purpose of the need proceeding is to determine if the full capacity requested should be built.

For these reasons I conclude that Duke New Smyrna is a proper applicant in the instant docket because of the partnership with the City of New Symrna.

Section 403.519, Florida Statutes, inter alia, sets forth the criteria upon which the Commission is to base its determination of need:

> . . . In making its determination, the Commission shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and *whether the proposed plant is the most cost-effective alternative available.*

Historically, the Commission has conducted extensive inquiries of alternative means to meet capacity requirements. The Commission has explored options that avoid building generation facilities, and options for the use of alternative generation technologies. *See In re: Petition to determine need for Proposed Electrical Power Plant in St. Marks, Wakulla County, by City of Tallahassee*, Order No. PSC-97-0659-FOF-EM, issued June 9, 1997. *See also In re: Petition for Certification of Need for Orlando Utilities Commission, Curtis H. Stanton Energy Unit 1, And Related Facilities*, Order No. 10320, Docket No. 810180-EU, issued September 2, 1981.

In this proceeding, the Commission is asked to engage in a new analysis to determine if the proposed plant is the most cost effective alternative for the need to be certified. The Commission is asked to find that the petition is cost effective because, as the petitioners contend, the purchase of the

proposed plant's capacity on the wholesale market will render economic benefits to all buyers (wholesale purchasers). They also expect further economic benefits from the translation of the wholesale market pricing into lower retail prices. Although, it is certainly possible for a least cost alternative to emerge from a wholesale market, this scenario appears to be based on an assumption that the market clearing price of capacity will always favor buyers. In addition, it is also assumed that the contract terms, which are yet to be determined, will always be beneficial to ratepayers.

These are especially important points given the considerable reliance by the petitioners on the economic benefits of the wholesale market that are used to justify the need for the full plant capacity. Even though the petitioners support their case by calling on the broader need of Peninsular Florida, it is argued that the ratepayers will not be required to cover the costs of the plant; the public will only incur costs when retail providers tap into an efficient wholesale market.

In this docket it is questionable as to whether the intended benefits of an efficient wholesale market will come to fruition in the manner that has been described. In my opinion, the petitioners have failed to provide the weight of evidence required to depart from the Commission's long-standing policy of relying on its own cost effectiveness analysis of a proposed plant.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all

requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within five (5) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

APPENDIX D

TITLE 15—COMMERCE AND TRADE

CHAPTER 2C—PUBLIC UTILITY HOLDING COMPANIES

Sec. 79. Short title of chapter

This chapter may be cited as the "Public Utility Holding Company Act of 1935".

(Aug. 26, 1935, ch. 687, title I, Sec. 36, formerly Sec. 33, 49 Stat. 838; renumbered Sec. 35, Pub. L. 102-486, title VII, Sec. 711, Oct. 24, 1992, 106 Stat. 2905; renumbered Sec. 36, Pub. L. 104-104, title I, Sec. 103, Feb. 8, 1996, 110 Stat. 81.)

State Authorities; Construction

Section 731 of title VII of Pub. L. 102-486 provided that: "Nothing in this title [enacting sections 79z-5a and 79z-5b of this title and sections 824l, 824m, and 825o-1 of Title 16, Conservation, amending sections 796, 824, 824j, 824k, 825n, 825o, and 2621 of Title 16, and amending provisions set out as a note under section 79k of this title] or in any amendment made by this title shall be construed as affecting or intending to affect, or in any way to interfere with, the authority of any State or local government relating to environmental protection or the siting of facilities."

Cross References

Corporation of Foreign Bondholders Act, 1933, see section 77mm of this title.

Investment Advisers Act of 1940, see section 80b-20 of this title.

Investment Company Act of 1940, see section 80a-51 of this title.

Securities Act of 1933, see section 77a of this title.

Securities Exchange Act of 1934, see section 78a of this title.

Trust Indenture Act of 1939, see section 77aaa of this title.

TITLE 15—COMMERCE AND TRADE
CHAPTER 2C—PUBLIC UTILITY HOLDING COMPANIES

Sec. 79z-5a. Exempt wholesale generators

(a) Definitions

For purposes of this section—

(1) Exempt wholesale generator

The term "exempt wholesale generator" means any person determined by the Federal Energy Regulatory Commission to be engaged directly, or indirectly through one or more affiliates as defined in section 79b(a)(11)(B) of this title, and exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale. No person shall be deemed to be an exempt wholesale generator under this section unless such person has applied to the Federal Energy Regulatory Commission for a determination under this paragraph. A person applying in good faith for such a determination shall be deemed an exempt wholesale generator under this section, with all of the exemptions provided by this section, until the Federal Energy Regulatory Commission makes such determination. The Federal Energy Regulatory Commission shall make such determination within 60 days of its receipt of such application and shall notify the Commission whenever a determination is made under this paragraph that any person is an exempt wholesale generator. Not later than 12 months after October 24, 1992, the Federal Energy Regulatory Commission shall promulgate rules implementing the provisions of this paragraph. Applications for determination filed after the effective date of such rules shall be subject thereto.

(2) Eligible facility

The term "eligible facility" means a facility, wherever located, which is either—

(A) used for the generation of electric energy exclusively for sale at wholesale, or

(B) used for the generation of electric energy and leased to one or more public utility companies; Provided, That any such lease shall be treated as a sale of electric energy at wholesale for purposes of sections 824d and 824e of title 16.

Such term shall not include any facility for which consent is required under subsection (c) of this section if such consent has not been obtained. Such term includes interconnecting transmission facilities necessary to effect a sale of electric energy at wholesale. For purposes of this paragraph, the term "facility" may include a portion of a facility subject to the limitations of subsection (d) of this section and shall include a facility the construction of which has not been commenced or completed.

(3) Sale of electric energy at wholesale

The term "sale of electric energy at wholesale" shall have the same meaning as provided in section 824(d) of title 16.

(4) Retail rates and charges

The term "retail rates and charges" means rates and charges for the sale of electric energy directly to consumers.

TITLE 16—CONSERVATION

CHAPTER 12—FEDERAL REGULATION AND DEVELOPMENT OF POWER

SUBCHAPTER II—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

Sec. 824j. Wheeling authority

(a) Transmission service by any electric utility; notice, hearing and findings by Commission

Any electric utility, Federal power marketing agency, or any other person generating electric energy for sale for resale, may apply to the Commission for an order under this subsection requiring a transmitting utility to provide transmission services (including any enlargement of transmission capacity necessary to provide such services) to the applicant. Upon receipt of such application, after public notice and notice to each affected State regulatory authority, each affected electric utility, and each affected Federal power marketing agency, and after affording an opportunity for an evidentiary hearing, the Commission may issue such order if it finds that such order meets the requirements of section 824k of this title, and would otherwise be in the public interest. No order may be issued under this subsection unless the applicant has made a request for transmission services to the transmitting utility that would be the subject of such order at least 60 days prior to its filing of an application for such order.

TITLE 16—CONSERVATION

CHAPTER 12—FEDERAL REGULATION AND DEVELOPMENT OF POWER

SUBCHAPTER II—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

Sec. 824k. Orders requiring interconnection or wheeling

(a) Rates, charges, terms, and conditions for wholesale transmission services

An order under section 824j of this title shall require the transmitting utility subject to the order to provide wholesale transmission services at rates, charges, terms, and conditions which permit the recovery by such utility of all the costs incurred in connection with the transmission services and necessary associated services, including, but not limited to, an appropriate share, if any, of legitimate, verifiable and economic costs, including taking into account any benefits to the transmission system of providing the transmission service, and the costs of any enlargement of transmission facilities. Such rates, charges, terms, and conditions shall promote the economically efficient transmission and generation of electricity and shall be just and reasonable, and not unduly discriminatory or preferential. Rates, charges, terms, and conditions for transmission services provided pursuant to an order under section 824j of this title shall ensure that, to the extent practicable, costs incurred in providing the wholesale transmission services, and properly allocable to the provision of such services, are recovered from the applicant for such order and not from a transmitting utility's existing wholesale, retail, and transmission customers.

APPENDIX E

DEPARTMENT OF ENERGY

[Docket Nos. RM95–8–000 and RM94–7–001; Order No. 888]

Federal Energy Regulatory Commission

18 CFR Parts 35 and 385

Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities

Issued April 24, 1996.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

I. INTRODUCTION/SUMMARY

Today the Commission issues three final, interrelated rules designed to remove impediments to competition in the wholesale bulk power marketplace and to bring more efficient, lower cost power to the Nation's electricity consumers.[1] The legal and policy cornerstone of these rules is to remedy undue discrimination in access to the monopoly owned transmission wires that control whether and to whom

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[1] These rules are the rules on open access and stranded costs in the above dockets (FERC Stats. & Regs. ¶ 31,036), and an accompanying rule on Open Access Same-Time Information System and Standards of Conduct (OASIS Final Rule) (FERC Stats. & Regs. ¶ 31,037) being issued contemporaneously. The Commission also is issuing contemporaneously a notice of proposed rulemaking on capacity reservation open access transmission tariffs in Docket No. RM96–11–000, FERC Stats. & Regs. ¶ 32,517. These final rules and proposed rule are being published concurrently in the Federal Register.

electricity can be transported in interstate commerce. A second critical aspect of the rules is to address recovery of the transition costs of moving from a monopoly-regulated regime to one in which all sellers can compete on a fair basis and in which electricity is more competitively priced.

In the year since the proposed rules were issued,[2] the pace of competitive changes in the electric utility industry has accelerated. By March of last year, 38 public utilities had filed wholesale open access transmission tariffs with the Commission. Today, prodded by such competitive changes and encouraged by our proposed rules, 106 of the approximately 166 public utilities that own, control, or operate [3] transmission facilities used in interstate commerce have filed some form of wholesale open access tariff. In addition, since the time the proposed rules were issued, numerous state regulatory commissions have adopted or are actively evaluating retail customer choice programs or other utility restructuring alternatives. These events have been spurred by continuing pressures in the marketplace for

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[2] On March 29, 1995, the Commission issued two notices of proposed rulemaking concerning open access transmission and stranded cost recovery. Promoting Wholesale Competition Through Open-Access Non-Discriminatory Transmission Service by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Notice of Proposed Rulemaking and Supplemental Notice of Proposed Rulemaking, 60 FR 17662 (April 7, 1995), FERC Stats. & Regs. ¶ 32,514 (1995). On December 13, 1995, the Commission issued a notice of proposed rulemaking on information systems. Real-Time Information Networks and Standards of Conduct, Notice of Proposed Rulemaking, 60 FR 66182 (December 21, 1995), FERC Stats. & Regs. ¶ 32,516 (1995).

[3] The Commission's notice of proposed rulemaking in the above dockets proposed to apply the proposed requirements to public utilities that own and/or control facilities used for the transmission of electric energy in interstate commerce. "Own and/or control" is intended to include public utilities that "operate" facilities used for the transmission of electric energy in interstate commerce. However, we have modified the Final Rule regulatory text to remove any ambiguity.

changes in the way electricity is bought, sold, and transported. Increasingly, customers are demanding the benefits of competition in the growing electricity commodity market.

The Commission estimates the potential quantitative benefits from the Final Rule will be approximately $3.8 to $5.4 billion per year of cost savings, in addition to the non-quantifiable benefits that include better use of existing assets and institutions, new market mechanisms, technical innovation, and less rate distortion. The continuing competitive changes in the industry and the prospect of these benefits to customers make it imperative that this Commission take the necessary steps within its jurisdiction to ensure that all wholesale buyers and sellers of electric energy can obtain non-discriminatory transmission access, that the transition to competition is orderly and fair, and that the integrity and reliability of our electricity infrastructure is maintained.

In this Rule, the Commission seeks to remedy both existing and future undue discrimination in the industry and realize the significant customer benefits that will come with open access. Indeed, it is our statutory obligation under sections 205 and 206 of the Federal Power Act (FPA) to remedy undue discrimination.

To do so, we must eliminate the remaining patchwork of closed and open jurisdictional transmission systems and ensure that all these systems, including those that already provide some form of open access, cannot use monopoly power over transmission to unduly discriminate against others. If we do not take this step now, the result will be benefits to some customers at the expense of others. We have learned from our experience in the natural gas area the importance of addressing competitive transition issues early and with as much certainty to market participants as possible.

Accordingly, in this proceeding and in the accompanying proceeding on OASIS, the Commission, pursuant to its authorities under sections 205 and 206 of the FPA:

> Requires all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce
>
> To file open access non-discriminatory transmission tariffs that contain minimum terms and conditions of non-discriminatory service;
>
> To take transmission service (including ancillary services) for their own new wholesale sales and purchases of electric energy under the open access tariffs;
>
> To develop and maintain a same-time information system that will give existing and potential transmission users the same access to transmission information that the public utility enjoys, and further requires public utilities to separate transmission from generation marketing functions and communications;
>
> Clarifies Federal/state jurisdiction over transmission in interstate commerce and local distribution and provides for deference to certain state recommendations; and
>
> Permits public utilities and transmitting utilities to seek recovery of legitimate, prudent and verifiable stranded costs associated with providing open access and FPA section 211 transmission services.

Open Access

The Final Rule requires public utilities to file a single open access tariff that offers both network, load-based service and point-to-point, contract-based service. The Rule contains a pro forma tariff that reflects modifications to the NOPR's

proposed terms and conditions and also permits variations for regional practices. All public utilities subject to the Rule, including those that already have tariffs on file, will be required to make section 206 compliance filings to meet the new pro forma tariff non-price minimum terms and conditions of non-discriminatory transmission. Utilities may propose their own rates in a section 205 compliance filing.

The Rule provides that public utilities may seek a waiver of some or all of the requirements of the Final Rule. In addition, non-public utilities may seek a waiver of the tariff reciprocity provisions.

The Final Rule does not generically abrogate existing requirements contracts, but will permit customers and public utilities to seek modification, or termination, of certain existing requirements contracts on a case-by-case basis. As to coordination arrangements and contracts, the Rule finds that these arrangements and contracts may need to be modified to remove unduly discriminatory transmission access and/or pricing provisions. Such arrangements and agreements include power pool agreements, public utility holding company agreements, and certain bilateral co-ordination agreements. The Rule provides guidance and timelines for modifying unduly discriminatory coordination arrangements and contracts, and specifies when the members of such arrangements must begin to conduct trade with each other using the same open access tariff offered to others. The Rule also provides guidance regarding the formation of independent system operators (ISOs).

The Rule does not require any form of corporate restructuring, but will accommodate voluntary restructuring that is consistent with the Rule's open access and comparability policies.

As discussed in the NOPR, not all owners or controllers of interstate transmission facilities are subject to the

Commission's jurisdiction under sections 205 and 206 of the FPA and therefore are not subject to this Rule's open access requirements. Therefore, the Final Rule retains the proposed reciprocity provision in the pro forma tariff. Without such a provision, non-open access utilities could take advantage of the competitive opportunities of open access, while at the same time offering inferior access, or no access at all, over their own facilities. Thus, open access utilities would be unfairly burdened. We note that some non-jurisdictional utilities have expressed an interest in a mechanism for obtaining a Commission determination that their transmission tariffs satisfy the reciprocity provisions in the pro forma tariffs, and we provide such a mechanism in the Rule.

The Final Rule does not generically provide for market-based generation rates. Although the Rule codifies the Commission's prior decision that there is no generation dominance in new generating capacity, intervenors in cases may raise generation dominance issues related to new capacity. In addition, to obtain market-based rates for existing generation, we will continue to require public utilities to show, on a case-by-case basis, that there is no generation dominance in existing capacity. Further, in all market-based rate cases, we will continue to look at whether an applicant and its affiliates could erect other barriers to entry and whether there may be problems due to affiliate abuse or reciprocal dealing.

Finally, contemporaneously with this Rule the Commission issues an NOPR on capacity reservation tariffs as an alternative, and perhaps superior, means of remedying undue discrimination.

Transmission/Local Distribution

The Rule clarifies the Commission's interpretation of the Federal/state jurisdictional boundaries over transmission and local distribution. While we reaffirm our conclusion that this

Commission has exclusive jurisdiction over the rates, terms, and conditions of unbundled retail transmission in interstate commerce by public utilities, we nevertheless recognize the very legitimate concerns of state regulatory authorities as they contemplate direct retail access or other state restructuring programs. Accordingly, we specify circumstances under which we will give deference to state recommendations. Although jurisdictional boundaries may shift as a result of restructuring programs in wholesale and retail markets, we do not believe this will change fundamental state regulatory authorities, including authority to regulate the vast majority of generation asset costs, the siting of generation and transmission facilities, and decisions regarding retail service territories. We intend to be respectful of state objectives so long as they do not balkanize interstate transmission of power or conflict with our interstate open access policies.

Stranded Costs

With regard to stranded costs, the Final Rule adopts the Commission's supplemental proposal. It will permit utilities to seek extra-contractual recovery of stranded costs associated with a limited set of existing (executed on or before July 11, 1994) wholesale requirements contracts and provides that the Commission will be the primary forum for utilities to seek recovery of stranded costs associated with retail-turned-wholesale transmission customers. It also will allow utilities to seek recovery of stranded costs caused by retail wheeling only in circumstances in which the state regulatory authority does not have authority to address retail stranded costs at the time the retail wheeling is required. The Rule retains the revenues lost approach for calculating stranded costs and provides a formula for calculating such costs.

Environmental Issues

The Commission has prepared a Final Environmental Impact Statement (FEIS) evaluating the possible environmental consequences of changes in the bulk power marketplace expected to occur as a result of the open access requirements of this Final Rule. The FEIS focuses, as do most commenters, on possible increases in emissions of nitrogen oxides (NO_X) from certain fossil-fuel fired generators, which could affect air quality in the producing region and in areas to which these emissions may be carried.

In response to comments on the Draft EIS, the Commission performed numerous additional studies. The FEIS finds that the relative future competitiveness of coal and natural gas generation is the key variable affecting the impact of the Final Rule. If competitive conditions favor natural gas, the Rule is likely to lead to environmental benefits. Both EPA and the Commission staff believe this projected scenario is the more likely one. If competitive conditions favor coal, the Rule may lead to small negative environmental impacts. However, even using the most extreme, unlikely assumptions about the future of the industry, the negative consequences are not likely to occur until after the turn of the century. Because the impacts will remain modest at least until 2010, there is no need for an interim mitigation program. In addition, even if the data showed more significant negative consequences requiring mitigation, the Commission does not have the statutory authority under the Federal Power Act or the expertise to address this possible far-term problem. The Commission believes, however, that there is time for federal and state air quality authorities to address any potential adverse impact as part of a comprehensive NO_X regulatory program under the Clean Air Act.[4]

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[4] 42 U.S.C. 7401, *et seq.*

Despite our conclusions regarding the lack of environmental impacts expected to result from the Rule, the Commission has examined a wide variety of proposals for mitigating possible adverse effects. We share the view of most commenters that the preferred approach for mitigating increased NO_X emissions generally is a NO_X cap and trading regulatory program comparable to that developed by Congress to address sulfur dioxide emissions in the Clean Air Act Amendments of 1990.[5] The Commission has examined various means of establishing such a program, including use of existing federal authorities under the Clean Air Act, cooperative efforts by state and federal air quality regulators, and development of a new emissions regulatory program administered by the Commission under the Federal Power Act. The Commission has concluded that a NOx regulatory program could best be developed and administered under the Clean Air Act, in cooperation with interested states, and offers to lend Commission support to that effort should it become necessary.

Conclusion

The Commission believes that the Final Rule will remedy undue discrimination in transmission services in interstate commerce and provide an orderly and fair transition to competitive bulk power markets.

II. Public Reporting Burden

The Open Access Final Rule and the Stranded Cost Final Rule specify filing requirements to be followed by public utilities that own, control or operate transmission facilities in interstate commerce in making non-discriminatory open access tariff filings and filings to recover legitimate, prudent and verifiable stranded costs. The information collection

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[5] 42 U.S.C.A. 7651b–e.

requirements of the final rules are attributable to FERC–516 "Electric Rate Filings." The current total annual reporting burden for FERC–516 is 828,300 hours.

A. Docket No. RM95–8–000 (Open Access Final Rule)

The Open Access Final Rule requires public utilities filing non-discriminatory open access tariffs to provide certain information to the Commission. The Commission estimated that the public reporting burden for the information collection would average 300 hours per response. This estimate included time for reviewing the requirements of the Commission's regulations, searching existing data sources, gathering and maintaining the necessary data, completing and reviewing the collection of information, and filing the revised information. No comments on the burden estimate were received. Because the Final Rule adopts essentially the same information requirements that are contained in the proposed rule, we believe that the average filing burden is same for the Final Rule.

In the proposed rule, the Commission noted that there are approximately 328 public utilities, including marketers and wholesale generation entities. We initially estimated that 137 public utilities own, control or operate facilities used for the transmission of electric energy in interstate commerce, and would be subject to the filing requirements of the proposed rule. Upon further review, the Commission believes that approximately 166 public utilities will respond to the information collection. Accordingly, the public reporting burden is estimated to be 49,800 hours.

B. Docket No. RM94–7–001 (Stranded Cost Final Rule)

In the supplemental notice of proposed rulemaking, the Commission estimated that the information requirements of the proposed rule would not differ substantially from those

contained in the initial proposed rule. In that notice, the Commission estimated that the public reporting burden for the information requirements contained in the proposed rule would be 50 hours per response with 10 responses annually. No comments on this filing burden were received. The information requirements adopted in the Stranded Cost Final Rule are not substantially different from those in the proposed rule. Therefore, the Commission concludes that there will be no additional public filing burden associated with the Stranded Cost Final Rule.

III. Background

In the NOPR, we set out a detailed statement of the events leading up to this rulemaking. We repeat that background here, updated to reflect what has happened since March 1995, and discuss why it is necessary to undertake regulatory reform in the electric industry at this time. We do so to provide the necessary backdrop to our action in adopting this Rule.

A. Structure of the Electric Industry at Enactment of Federal Power Act

The Federal Power Act was enacted in an age of mostly self-sufficient, vertically integrated electric utilities, in which generation, transmission, and distribution facilities were owned by a single entity and sold as part of a bundled service (delivered electric energy) to wholesale and retail customers. Most electric utilities built their own power plants and transmission systems, entered into interconnection and coordination arrangements with neighboring utilities, and entered into long-term contracts to make wholesale requirements sales (bundled sales of generation and transmission) to municipal, cooperative, and other investor-owned utilities (IOUs) connected to each utility's transmission system. Each system covered limited service areas. This structure of separate systems arose naturally due primarily to

the cost and technological limitations on the distance over which electricity could be transmitted.

Through much of the 1960s, utilities were able to avoid price increases, but still achieve increased profits, because of substantial increases in scale economies, technological improvements, and only moderate increases in input prices.[6] Thus, there was no pressure on regulatory commissions to use regulation to affect the structure of the industry.[7]

B. Significant Changes in the Electric Industry

In the late 1960s and throughout the 1970s, a number of significant events occurred in the electric industry that changed the perceptions of utilities and began a shift to a more competitive marketplace for wholesale power.[8] This was the beginning of periods of rapid inflation, higher nominal interest rates, and higher electricity rates.[9] During this time, consumers became concerned about higher electricity rates and questioned any price increases filed by utilities.[10]

During this same time frame, the construction of nuclear and other capital-intensive base load facilities—actively encouraged by federal and some state governments—

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[6] Paul L. Joskow, Inflation and Environmental Concern: Structural Change in the Process of Public Utility Regulation, 17 J. Law & Econ. 291, 312(1974); *see also* Charles F. Phillips, Jr., *The Regulation of Public Utilities* 11 (1988).

[7] *See* Joskow, supra at 312; *see also* Phillips, *supra* at 12.

[8] *See* Joskow, supra at 312; *see also* Phillips, *supra* at 12–13.

[9] *See* Joskow, *supra* at 312–13; *see also* Phillips, *supra* at 13. The Arab oil embargo resulted in significantly higher oil prices through the 1970s. *See* Richard J. Pierce, Jr., The Regulatory Treatment of Mistakes in Retrospect: Canceled Plants and Excess Capacity, 132 U. Pa. L. Rev. 497, 501 (1984).

[10] *See* Joskow, *supra* at 313; *see also* Phillips, *supra* at 13.

contributed to the continuing cost increases and uncertainties in the industry.[11] These investments were made based on the assumptions that there would be steady increases in the demand for electricity and continued large increases in the price of oil.[12] However, due to conservation and economic downturns, the expected demand increases did not materialize. Load growth virtually disappeared in some areas, and many utilities unexpectedly found themselves with excess capacity.[13] In addition, by the 1980s, the oil cartel collapsed, with a resulting glut of low-priced oil.[14] At the same time, inflation substantially increased the costs of these large baseload generating plants.[15] Surging interest rates further increased the cost of the capital needed to finance and capitalize these projects and completion schedules were significantly extended by, in part, more stringent safety and environmental requirements.[16]

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[11] *See generally Jersey Central Power & Light Company v. FERC*, 810 F.2d 1168, 1171 (D.C. Cir.1987).

[12] *Id*

[13] *See* Pierce, *supra* at 503. By 1983, the Department of Energy had estimated that the sunk costs for canceled nuclear plants alone amounted to $10 billion. *Id.* at 498.

[14] *Id.*

[15] *See* Bernard S. Black & Richard J. Pierce, Jr., The Choice Between Markets and Central Planning in Regulating the U.S. Electricity Industry, 93 Col. L. Rev. 1339, 1346 (1993) ("Actual costs of nuclear power plants vastly exceeded estimates, sometimes by as much as 1000%.").

[16] *See* Phillips, *supra* at 13. Fossil fuel-fired plants became subject to increased regulation as a result of the Clean Air Act of 1970, and its 1977 amendments. 42 U.S.C. 7401–7642. In 1971, nuclear plant licensing became subject to the environmental impact statement requirements of the National Environmental Policy Act of 1969. 42 U.S.C. 4332. Following the 1979 accident at the Three Mile Island nuclear plant, nuclear plants also became subject to additional safety regulations, resulting in higher costs. *See* Energy Information Administration, *The Changing Structure of the Electric Power Industry 1970-1991* (March 1993) 35. Between 1976

As a result, expensive large baseload plants for which there was little or no demand, came onto the market or were in the process of being constructed. Accordingly, between 1970 and 1985, average residential electricity prices more than tripled in nominal terms, and increased by 25% after adjusting for general inflation.[17] Moreover, average electricity prices for industrial customers more than quadrupled in nominal terms over the same period and increased 86% after adjusting for inflation.[18] The rapidly increasing rates for electric power during this period, together with the opportunities provided by the Public Utility Regulatory Policies Act of 1978 (PURPA) (discussed *infra*), also prompted some industrial customers to bypass utilities by constructing their own generation facilities. This further exacerbated rate increases for remaining customers—primarily residential and commercial customers.

Consumers responded to these "rate shocks" by exerting pressure on regulatory bodies to investigate the prudence of management decisions to build generating plants, especially when construction resulted in cost overruns, excess capacity, or both. Between 1985 and 1992, writeoffs of nuclear power plants totaled $22.4 billion.[19] These writeoffs significantly reduced the earnings of the affected utilities.[20] Delays in obtaining rate increases to reflect the effects of inflation further reduced investor returns. Thus, many utilities became

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and 1980, most states and many localities instituted laws governing power plant siting.

[17] Based on retail prices reported in Energy Information Administration (EIA), Monthly Energy Review, January 1995, Table 9.9 (Prices adjusted for inflation using the GDP Deflator (1987 = 100)).

[18] *Id.*

[19] *See* Black & Pierce, *supra* at 1346 (These write-offs were "about 17% of the book value of total 1992 utility investment.").

[20] *Id.*

reluctant to commit capital to long-term construction decisions involving large scale generating plants.[21]

In addition to economic changes in the industry, significant technological changes in both generation and transmission have occurred since 1935. Through the 1960s, bigger was cheaper in the generation sector and the industry was able to capitalize on economies of scale to produce power at lower per-unit costs from larger and larger plants.[22] As a result, large utility companies that could finance and manage construction projects of larger scale had a price advantage over smaller utility companies and customers who might otherwise have considered building their own generating units. Scale economies encouraged power generation by large vertically-integrated utility companies that also transmitted and distributed power. Beginning in the 1970s, however, additional economies of scale in generation were no longer being achieved.[23] A significant factor was that larger generation units were found to need relatively greater maintenance and experience longer downtimes.[24] The electric industry faced the situation "where the price of each

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[21] *Id.* ("The high perceived risk of future disallowances reversed utilities' incentives to overinvest, and made utilities extremely reluctant to build new power plants.").

[22] *See* Preston Michie, Billing Credits for Conservation, Renewable, and Other Electric Power Resources: an Alternative to Marginal-Cost-Based Power Rates in the Pacific Northwest, 13 Environmental Law 963, 964–65 (1983).

[23] *Id.* at 965

[24] Energy Information Administration, The Changing Structure of the Electric Power Industry 1970–1991 (March 1993) 37 ("As larger units were constructed, however, utilities discovered that downtime was as much as 5 times greater for units larger than 600 megawatts than for units in the 100-megawatt range.")

incremental unit of electric power exceeded the average cost." [25] Bigger was no longer better.

Further dictating against larger generation units were advances in technologies that allowed scale economies to be exploited by smaller size units, thereby allowing smaller new plants to be brought on line at costs below those of the1970s and earlier. Such new technologies include combined cycle units and conventional steam units that use circulating fluidized bed boilers.[26]

The combined cycle generating plants generally use natural gas as their primary fuel. This technology has been made possible by the development of more efficient gas turbines, shorter construction lead times, lower capital costs, increased reliability, and relatively minimal environmental impacts.[27] Similarly, the circulating fluidized bed combustion boilers, fueled by coal and other conventional fuels, provide a more efficient and less polluting resource.

Today, "the optimum size (of generation plants) has shifted from (more than 500 MW) (10-year lead time) to smaller units (one-year lead time) (in the 50- to 150–MW range)." [28] Indeed, smaller and more efficient gas-fired

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[25] *Id.*; *see also* George A. Perrault, Downsizing Generation: Utility Plans for the 1990s, Pub. Util. Fort. 15–16 (Sept. 27, 1990) ("The large base-load generating units that form the backbone of utility systems are almost totally absent from capacity plans for the 1990s.").

[26] "From 1982 through 1991, the average capacity of fluidized-bed units increased rapidly to 72 megawatts for 4 units in 1991. The average capacity for the 19 units planned to begin operating in 1992 through 1995 increases to 83 megawatts." Energy Information Administration, *The Changing Structure of the Electric Power Industry 1970–1991* (March 1993) 38.

[27] *See* Charles E. Bayless, Less is More: Why Gas Turbines Will Transform Electric Utilities, Pub. Util. Fort. (Dec. 1, 1994) 21.

[28] *Id.* at 24. *See also* Wallace E. Brand, Is Bigger Better? Market Power in Bulk Power Supply: From FDR to NOPR, Pub. Util. Fort. (Feb. 15,

combined-cycle generation facilities can produce power on the grid at a cost ranging from 5 cents per kWh to less than 3 cents per kWh.[29] This is significantly less than the costs for large plants constructed and installed by utilities over the last decade, which were typically in the range of 4 to 7 cents per kWh for coal plants and 9 to 15 cents for nuclear plants.[30] Significant changes have also occurred in the transmission sector of the industry. Technological advances in transmission have made possible the economic transmission of electric power over long distances at higher voltages.[31] This has made it technically feasible for utilities with lower cost generation sources to reach previously isolated systems where customers had been captive to higher cost generation. In addition, the nature and magnitude of coordination transactions [32] have changed dramatically since enactment of

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1996) 23 at 25 (while the optimal baseload unit size is about 500 MW for coal-fired steam turbines, the optimal size for gas fired combined-cycle units is about 150 to 200 MW).

[29] FERC staff calculations based in part on combined-cycle plant cost data reported in 1994 FERC Form No. 1 for a sample of units placed in service during 1990–94. Costs vary with regional fuel and construction costs, among other reasons.

[30] Coal and Nuclear plant cost data reported in 1994 FERC Form No. 1 and the EIA report, *Electric Plant Cost and Power Production Expenses 1991*, 1993 DOE/EIA–0455(91), for plants placed in service during 1986–94; *see also* The 1994 Electric Executives' Forum, Bakke (President and CEO of the AES Corporation), Pub. Util. Fort. (June 1, 1994) 45 ("New generation can be built at about 3 cents per kilowatt-hour (U.S. average). Old generation costs about twice that * * *").

[31] *See* Black & Pierce, *supra* at 1345 (In the late 1960s and 1970s, improved transmission efficiency and development of regional transmission networks "made it possible to build power plants up to 1000 miles from power users.").

[32] Coordination transactions are voluntary sales or exchanges of specialized electricity services that allow buyers to realize cost savings or reliability gains that are not attainable if they rely solely on their own resources. For sellers, these transactions provide opportunities to earn

the FPA, allowing increased coordinated operations and reduced reserve margins. Substantial amounts of electricity now move between regions, as well as between utilities in the same region. Physically isolated systems have become a thing of the past.

C. The Public Utility Regulatory Policies Act and the Growth of Competition

In enacting PURPA,[33] Congress recognized that the rising costs and decreasing efficiencies of utility-owned generating facilities were increasing rates and harming the economy as a whole.[34] To lessen dependence on expensive foreign oil, avoid repetition of the 1977 natural gas shortage, and control consumer costs, Congress sought to encourage electric utilities to conserve oil and natural gas.[35] In particular, Congress sanctioned the development of alternative generation sources designated as "qualifying facilities" (QFs) as a means of reducing the demand for traditional fossil fuels.[36] PURPA required utilities to purchase power from

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additional revenue, and to lower customer rates, from capacity that is temporarily excess to native load capacity requirements.

[33] Pub. L. No. 95–617, 92 Stat. 3117 (codified in U.S.C. sections 15, 16, 26, 30, 42, and 43).

[34] *See* generally FERC v. Mississippi, 456 U.S. 742, 745–46 (1982).

[35] The Power Plant and Industrial Fuel Use Act of 1978. Pub. L. No. 95–617, 92 Stat. 3117 (codified in U.S.C. sections 15, 16, 26, 30, 42, and 43).

[36] QFs include certain cogenerators and small power producers. PURPA also added sections 210, 211, and 212 to the FPA, providing the Commission with authority to approve applications for interconnections and, in limited circumstances, wheeling. However, under section 211, as enacted in PURPA, the Commission could approve an application for wheeling only if it found, *inter alia*, that the order "would reasonably preserve existing competitive relationships." Because of this and other limitations in sections 211 and 212 as originally enacted, the provision was virtually ineffective. Only one section 211 order was ever issued

QFs at a price not to exceed the utility's avoided costs and to sell backup power to QFs.[37]

PURPA specifically set forth limitations on who, and what, could qualify as QFs. In addition to technological and size criteria, PURPA set limits on who could own QFs.[38] Notwithstanding these limitations, QFs proliferated. In 1989, there were 576 QF facilities. By 1993, there were more than 1,200 such facilities.[39] For the same time period, installed QF capacity increased from 27,429 megawatts to 47,774 megawatts.[40] The rapid expansion and performance of the QF industry demonstrated that traditional, vertically integrated public utilities need not be the only sources of reliable power.

During this period, the profile of generation investment began to change, and a market for non-traditional power supply beyond the purchases required by PURPA began to

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pursuant to the original provision, and it was pursuant to a settlement. See Public Service Company of Oklahoma, 38 FERC ¶ 61,050 (1987). As discussed *infra*, section 211 was subsequently revised by the Energy Policy Act of 1992.

[37] 456 U.S. at 750. Congress recognized that encouragement was needed in part because utilities had been reluctant to purchase electric power from, and sell power to, nonutility generators. *Id.* at 750–51.

[38] For example, PURPA provided that a cogeneration facility or small power production facility could not be owned by a person primarily engaged in the generation or sale of electric power (other than from cogeneration or small power production facilities). *See* 16 U.S.C.

[39] Energy Information Administration, *Electric Power Annual 1993* (December 1994) 124 (Table 77).

[40] *Id.* EIA data for 1989 through 1991 was for facilities of 5 megawatts or more and for 1992 and 1993 was for facilities of 1 megawatt or more. A comparison with Table 74 on page 121 for the years 1992 and 1993 reveals that this mixing of data bases is likely of minimal effect.

emerge. QFs were limited to cogenerators and small power producers.[41]

However, other non-traditional power producers who could not meet the QF criteria began to build new capacity to compete in bulk power markets, without such PURPA benefits as the mandatory purchase requirements. These producers, known as independent power producers (IPPs), were predominantly single-asset generation companies that did not own any transmission or distribution facilities. While traditional utilities were generally reluctant at that time to invest in new generating facilities under cost of service regulation, utilities increasingly became interested in participating in this new generation sector. They organized affiliated power producers (APPs), with assets not included in utility rate base, and sought to sell power in their own service territories and the territories of other utilities. At the same time, power marketers arose. These entities—owning no transmission or generation—buy and sell power.[42]

There were two major impediments to the development of IPPs and APPs. First, the ownership restrictions of the Public

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[41] Generally, the law has imposed an 80 MW cap on small power producers. A limited exception enacted in 1990 permitted small power facilities that could exceed 80 MW and still qualify as QFs under PURPA. This exception was limited to certain solar, wind, waste, and geothermal small power production facilities and only covered applications for certification of facilities as qualifying small power production facilities that were submitted no later than December 31, 1994 and for which construction commences no later than December 31, 1999. *See* Solar, Wind, Waste, and Geothermal Power Production Incentives Act of 1990, Pub. L. No. 101–575, 104 Stat. 2834 (1990), *amended*, Pub. L. No. 102–46, 105 Stat. 249 (1991).

[42] The first power marketer in the electric industry was Citizens Energy Corporation. *See* Citizens Energy Corporation, 35 FERC ¶ 61,198(1986). Power marketers take title to electric energy. Power brokers, on the other hand, do not take title and are limited to a matchmaking role.

Utility Holding Company Act (PUHCA) [43] severely inhibited these new entities from entering the generation business.[44] Second, these entities needed transmission service in order to compete in electricity markets.

While the Commission had no authority to remove PUHCA restrictions,[45] it encouraged the development of IPPs and APPs, as well as emerging power marketers, by authorizing market-based rates for their power sales on a case-by-case basis and by encouraging more widely available transmission access. From 1989 through 1993, facilities owned by IPPs and other non-traditional generators (other than QFs) increased from 249 to 634 and their installed capacity increased from 9,216 megawatts to 13,004 megawatts.[46] Indeed, "[i]n 1992, for the first time, generating capacity added by independent producers exceeded capacity added by utilities." [47]

Market-based rates helped to develop competitive bulk power markets. A generating utility allowed to sell its power at market-based rates could move more quickly to take advantage of short-term or even long-term market opportunities than those laboring under traditional cost-of-service tariffs, which entail procedural delays in achieving tariff approvals and changes.

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[43] 15 U.S.C. 79 *et seq.*

[44] As discussed *infra*, Congress eventually provided a means to avoid the PUHCA restrictions by creating exempt wholesale generators (EWGs) in the Energy Policy Act.

[45] The industry was successful to some extent in developing ownership structures that permitted such investment. *See, e.g.*, Commonwealth Atlantic Limited Partnership, 51 FERC ¶ 61,368 at 62,240 and n.20 (1990).

[46] Energy Information Administration, *Electric Power Annual 1993* (December 1994) 124 (Table77).

[47] Black & Pierce, *supra* at 1349 n.25.

In approving these market-based rates, the Commission required, *inter alia*, that the seller and any of its affiliates lack market power or mitigate any market power that they may have possessed.[48] The major concern of the Commission was whether the seller or its affiliates could limit competition and thereby drive up prices. A key inquiry became whether the seller or its affiliates owned or controlled transmission facilities in the relevant service area and therefore, by denying access or imposing discriminatory terms or conditions on transmission service, could foreclose other generators from competing.[49] As we have previously explained:

> The most likely route to market power in today's electric utility industry lies through ownership or control of transmission facilities. Usually, the source of market power is dominant or exclusive ownership of the facilities. However, market power also may be gained without ownership. Contracts can confer the same rights of control. Entities with contractual control over transmission facilities can withhold supply and extract monopoly prices just as effectively as those who control facilities through ownership.[50]

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[48] *See*, e.g., Ocean State Power, 44 FERC ¶ 61,261 (1988); Commonwealth Atlantic Limited Partnership, 51 FERC ¶ 61,368 (1990); Citizens Power & Light Company, 48 FERC ¶ 61,210 (1989); Orange and Rockland Utilities, Inc., 42 FERC ¶ 61,012 (1988); Doswell Limited Partnership, 50 FERC ¶ 61,251 (1990) (*Doswell*); and Dartmouth Power Associates Limited Partnership, 53 FERC ¶ 61,117 (1990).

[49] *See, e.g., Doswell*, 50 FERC at 61,757.

[50] Citizens Power & Light Corporation, 48 FERC ¶ 61,210 at 61,777 (1989) (emphasis in original); *see also* Utah Power & Light Company, PacifiCorp and PC/UP&L Merging Corporation, 45 FERC ¶ 61,095 at 61,287–89 (1988), *order on reh'g*, 47 FERC ¶ 61,209, *order on reh'g*, 48 FERC ¶ 61,035 (1989), *remanded in part sub nom.* Environmental Action, Inc. v. FERC, 939 F.2d 1057 (D.C. Cir. 1991), *order on remand*, 57 FERC ¶ 61,363 (1991).

As entry into wholesale power generation markets increased, the ability of customers to gain access to the transmission services necessary to reach competing suppliers became increasingly important.[51] In addition, beginning in the late 1980s, in order to mitigate their market power to meet Commission conditions, public utilities seeking Commission approval of mergers or consolidations under section 203 of the FPA or Commission authorization for blanket approval of market-based rates for generation services under section 205 of the FPA, filed "open access" transmission tariffs of general applicability.[52] The Commission applied its market rate analysis to IOUs, as well as IPPs, APPs, and marketers, and allowed IOUs to sell at market-based rates only if they

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[51] In earlier years, a few customers were able to obtain access as a result of litigation, beginning with the Supreme Court's decision in *Otter Tail Power Company v. United States*, 410 U.S. 366 (1973). Additionally, some customers gained access by virtue of Nuclear Regulatory Commission license conditions and voluntary preference power transmission arrangements associated with federal power marketing agencies. *See, e.g.*, Consumers Power Company, 6 NRC 887, 1036–44 (1977) and The Toledo Edison Company and Cleveland Electric Illuminating Company, 10 NRC 265, 327–34 (1979). *See* Florida Municipal Power Agency v. Florida Power and Light Company, 839 F. Supp. 1563 (M.D. Fla. 1993). *See also* Electricity Transmission: Realities, Theory and Policy Alternatives, The Transmission Task Force Report to the Commission, October 1989, 197.

[52] *See, e.g.*, Public Service Company of Colorado, 59 FERC ¶ 61,311 (1992), *reh'g denied*, 62 FERC ¶ 61,013 (1993); Utah Power & Light Company, *et al.*, Opinion No. 318, 45 FERC ¶ 61,095 (1988), *order on reh'g*, Opinion No. 318–A, 47 FERC ¶ 61,209 (1989), *order on reh'g*, Opinion No. 318–B, 48 FERC ¶ 61,035 (1989), *aff'd in relevant part sub nom.* Environmental Action Inc. v. FERC, 939 F.2d 1057 (D.C. Cir. 1991); Northeast Utilities Service Company (Public Service Company of New Hampshire), Opinion No. 364–A, 58 FERC ¶ 61,070, *reh'g denied*, Opinion No. 364–B, 59 FERC ¶ 61,042, order granting motion to vacate and dismissing request for rehearing, 59 FERC ¶ 61,089 (1992), *affirmed in relevant part sub nom.* Northeast Utilities Service Company v. FERC, 993 F.2d 937 (1st Cir. 1993).

opened their transmission systems to competitors.[53] The Commission also approved proposed mergers on the condition that the merging companies remedy anticompetitive effects potentially caused by the merger by filing "open access" tariffs. These early "open access" tariffs required only that the companies provide point-to-point transmission services, which is a much narrower requirement than that being imposed in this Rule and did not require transmission owners to provide to others the same quality of service that they themselves enjoyed.

Following PURPA, the economic and technological changes in the transmission and generation sectors helped give impetus to the many new entrants in the generating markets who could sell electric energy profitably with smaller scale technology at a lower price than many utilities selling from their existing generation facilities at rates reflecting cost. However, it became increasingly clear that the potential consumer benefits that could be derived from these technological advances could be realized only if more efficient generating plants could obtain access to the regional transmission grids. Because many traditional vertically integrated utilities still did not provide open access to third parties and still favored their own generation if and when they provided transmission access to third parties, barriers continued to exist to cheaper, more efficient generation sources.

D. The Energy Policy Act

In response to the competitive developments following PURPA, and the fact that PUHCA and lack of transmission access remained major barriers to new generators, Congress

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[53] *See*, e.g., Public Service of Indiana, Inc., 51 FERC ¶ 61,367 (1990), *reh'g denied*, 52 FERC ¶ 61,260 (1990), *appeal dismissed sub nom.* Northern Indiana Public Service Company v. FERC, 954 F.2d 736 (D.C. Cir. 1992).

enacted Title VII of the Energy Policy Act of 1992 (Energy Policy Act).[54] A goal of the Energy Policy Act was to promote greater competition in bulk power markets by encouraging new generation entrants, known as exempt wholesale generators (EWGs), and by expanding the Commission's authority under sections 211 and 212 of the FPA to approve applications for transmission services.[55]

An EWG is defined as

> Any person determined by the Federal Energy Regulatory Commission to be engaged directly, or indirectly through one or more affiliates as defined in [PUHCA] section 2(a)(11)(B), and exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale.[56]

If the Commission, upon an application, determines that a person is an EWG, that person will be exempt from PUHCA.[57] This provision removed significant impediment to the development of IPPs and APPs by allowing them to develop projects as EWGs free from the strictures of PUHCA or the QF PURPA limitations.

While sections 211 and 212, as enacted by PURPA, were intended to provide greater access to the transmission grid, the limitations placed on these sections made them unusable

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[54] Pub. L. No. 102–486, 106 Stat. 2776 (1992), codified at, among other places, 15 U.S.C. 79z–5a and 16 U.S.C. 796 (22–25), 824j–l.

[55] *See* El Paso Electric Company and Central and South West Services Inc., 68 FERC ¶ 61,181 at 61,914 (1994) (*CSW*); *see also* Paul Kemezis, FERC's Competitive Muscle: The Comparability Standard, Electrical World 45 (Jan. 1995) ("In EPAct, Congress made it clear that the electric-power industry was to move toward a fully competitive market system, but left most of the implementation to FERC.").

[56] 15 U.S.C. 79z–5a.

[57] 15 U.S.C. 79z–5a(e).

in virtually all circumstances.[58] However, as amended by the Energy Policy Act, these sections now give the Commission broader authority to order transmitting utilities to provide wholesale transmission services, upon application, to any electric utility, Federal power marketing agency, or any other person generating electric energy for sale for resale.

The Energy Policy Act also added section 213 to the FPA. Section 213 (a) requires a transmitting utility that does not agree to provide wholesale transmission service in accordance with a good faith request to provide a written explanation of its proposed rates, terms, and conditions and its analysis of physical or other constraints.[59] Section 213 (b) required the Commission to enact a rule requiring transmitting utilities to submit annual information concerning potentially available transmission capacity and known constraints.[60]

E. The Present Competitive Environment

Following the Energy Policy Act, the Commission established rules: (1) For certain generators to obtain EWG

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[58] *See supra* note 36.

[59] *See* Policy Statement Regarding Good Faith Requests for Transmission Services and Responses by Transmitting Utilities Under Sections 211(a) and 213(a) of the Federal Power Act, as Amended and Added by the Energy Policy Act of 1992, 58 FR 38964 (July 21, 1993), FERC Stats. & Regs., Regulations Preambles ¶ 30,975 (1993) (Policy Statement Regarding Good Faith Requests for Transmission Services).

[60] *See* New Reporting Requirements Implementing Section 213(b) of the Federal Power Act and Supporting Expanded Regulatory Responsibilities Under the Energy Policy Act of 1992, and Conforming and Other Changes to Form No. FERC–714, 58 FR 52420 (October 8, 1993), FERC Stats. & Regs., Regulations Preambles ¶ 30,980 (Order No. 558), *reh'g denied*, Order No. 558–A, 65 FERC ¶ 61,324 (1993), *regulations modified*, 59 FR15333 (April 1, 1994), FERC Stats. & Regs., Regulations Preambles ¶ 30,993.

status and thus an exemption from PUHCA;[61] and (2) that required transmission information availability. The Commission also pursued a number of initiatives aimed at fostering the development of more competitive bulk power markets, including aggressive implementation of section 211, a new look at undue discrimination under the FPA, easing of market entry for sellers of generation from new facilities, and initiation of a number of industry-wide reforms. As stated by the Commission, in recognition of the Congressional goal in the Energy Policy Act of creating competitive bulk power markets:

> Our goal is to facilitate the development of competitively priced generation supply options, and to ensure that wholesale purchasers of electric energy can reach alternative power suppliers and vice versa.[62]

1. Use of Sections 211 and 212 to Obtain Transmission Access

The Commission has aggressively implemented sections 211 and 212 of the FPA, as amended by the Energy Policy Act, in order to promote competitive markets.[63] When

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[61] *See* Order No. 550, Filing Requirements and Ministerial Procedures for Persons Seeking Exempt Wholesale Generator Status, 58 FR 8897 (February18, 1993), FERC Stats. & Regs., Regulations Preambles ¶ 30,964, *order on reh'g*, Order No. 550–A, 58 FR 21250 (April 20, 1993), FERC Stats. & Regs., Regulations Preambles ¶ 30,969 (1993). As recognized by Congress and the Commission, availability of transmission information is critical in developing competitive markets. *See supra* notes 59 and 60. This opened the "black box" of information that previously was available only to transmission owners.

[62] *See* Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Notice of Proposed Rulemaking, 59 FR 35274 (July 11, 1994), FERC Stats. & Regs., Proposed Regulations ¶ 32,507 at 32,866 (Stranded Cost NOPR); American Electric Power Service Corporation, 67 FERC ¶ 61,168, *clarified*, 67 FERC ¶ 61,317 (1994).

[63] 16 U.S.C.A. 824j–824k (West 1985 and Supp.1994).

wheeling requests under sections 211 and 212 have been made, the Commission has required wheeling in almost all of the requests it has processed. To date, the Commission has issued orders (proposed or final) requiring wheeling in 12 of the 14 cases it has acted on.[64]

As a general matter, section 211 has permitted some inroads to be made by customers in obtaining transmission service from public utilities that historically have declined to provide access to their systems, or have offered service only on a discriminatory basis. Under section 211, the Commission has granted requests for the broader type of service that most utilities historically have refused to provide—network service. Although transmission owners have provided limited amounts of unbundled point-to-point transmission service, third-party customers have not been able to obtain the flexibility of service that transmission owners enjoy.

In *Florida Municipal*, a section 211 case, the Commission ordered "network," rather than the narrower "point-to-point," service.[65] Network service permits the applicant to

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[64] *See, e.g.*, final orders issued in City of Bedford, 68 FERC ¶ 61,003 (1994), *reh'g denied*, 73 FERC¶ 61,322 (1995); Florida Municipal Power Agency v. Florida Power & Light Company, 67 FERC ¶ 61,167 (1994), *order on reh'g*, 74 FERC ¶ 61,006 (1996); Minnesota Municipal Power Agency, 68 FERC ¶ 61,060 (1994); and Tex-La Electric Cooperative of Texas, 69 FERC ¶ 61,269 (1994); *see also* Appendix A.

[65] *See* Florida Municipal Power Agency v. Florida Power & Light Company, 65 FERC ¶ 61,125, *reh'g dismissed*, 65 FERC ¶ 61,372 (1993), *final order*, 67 FERC ¶ 61,167 (1994), *order on reh'g*, 74 FERC ¶ 61,006 (1996). The Commission has "characterized point-to-point service as involving designated points of entry into and exit from the transmitting utility's system, with a designated amount of transfer capability at each point." El Paso Electric Company v. Southwestern Public Service Company, 68 FERC ¶ 61,182 at 61,926 n.9 (1994) (*citing* Entergy Services, Inc., 58 FERC ¶ 61,234 at 61,768 (1993), *reh'g dismissed*, 68 FERC ¶ 61,399 (1994)). Network service allows more flexibility by allowing a transmission customer to use the entire transmission network

fully integrate load and resources on an instantaneous basis in a manner similar to the transmission owner's integration of its own load and resources. At the same time, the Commission made the generic finding that the availability of transmission service will enhance competition in the market for power supplies and lead to lower costs for consumers. The Commission explained that as long as the transmitting utility is fully and fairly compensated and there is no unreasonable impairment of reliability, transmission service is in the public interest.[66]

As discussed *infra*, based on the mounting competitive pressures in the industry and rapidly evolving markets, we have concluded that section 211 alone is not enough to eliminate undue discrimination. The comments received on the proposed rules, discussed in detail *infra*, confirm this conclusion. The significant time delays involved infilling an individual service request for bilateral service under section 211 place the customer at a severe disadvantage compared to the transmission owner and can result in discriminatory treatment in the use of the transmission system. It is an inadequate procedural substitute for readily available service under a filed non-discriminatory open access tariff. As the Commission noted in *Hermiston Generating Company*, "[t]he ability to spend time and resources litigating the rates, terms and conditions of transmission access is not equivalent to an enforceable voluntary offer to provide comparable service under known rates, terms and conditions." [67]

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to provide generation service for specified resources and specified loads without having to pay multiple charges for each resource-load pairing.

[66] *Florida Municipal*, 67 FERC at 61,477.

[67] 69 FERC ¶ 61,035 at 61,165 (1994), *reh'g denied*, 72 FERC ¶ 61,071 (1995); *see also* Southwest Regional Transmission Association, 69 FERC ¶ 61,100 at 61,398 (1994), *order on compliance filing*, 73 FERC ¶ 61,147 (1995) (*SWRTA*).

2. Commission's Comparability Standard

In the Spring of 1994, the Commission began to address the problem of the disparity in transmission service that utilities provided to third parties in comparison to their own uses of the transmission system. In the seminal case in this area, *American Electric Power Service Corporation* (*AEP*), the company voluntarily proposed a tariff of general applicability that would offer firm, point-to-point transmission service for a minimum of one month. [68] The Commission accepted the proposed transmission tariff for filing and suspended its effectiveness for one day, subject to refund.[69] Rehearing requests challenged the Commission's summary approval of the restriction of service to point-to-point as being discriminatory and anticompetitive.[70] The rehearing requests argued that the tariff should be expanded to include network services such as those used by the transmission owner. On rehearing, the Commission announced a new standard for evaluating claims of undue discrimination.

The Commission found that a voluntarily offered, new open access transmission tariff that did not provide for services comparable to those that the transmission owner provided itself was unduly discriminatory and anticompetitive.[71] In reaching that conclusion, the

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[68] 64 FERC ¶ 61,279 (1993), *reh'g granted*, 67 FERC ¶ 61,168, *clarified*, 67 FERC ¶ 61,317 (1994).

[69] The Commission explained that AEP could limit the service it was offering because it was "providing the service voluntarily under a tariff of general applicability." 64 FERC at 62,978.

[70] AEP, 67 FERC at 61,489.

[71] With respect to anticompetitive effects, the Commission explained that it has "adhered to the Supreme Court's determination that the Commission's 'important and broad regulatory power * * * carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations

Commission broadened its undue discrimination analysis (which traditionally had focused on the rates, terms, and conditions faced by similarly situated third-party customers) to include a focus on the rates, terms, and conditions of a utility's own uses of the transmission system:

> (A)n open access tariff that is not unduly discriminatory or anticompetitive should offer third parties access on the same or comparable basis, and under the same or comparable terms and conditions, as the transmission provider's uses of its system.[72]

Refocusing the analysis was necessitated by the changing conditions in the electric utility industry, including the emergence of non-traditional suppliers and greater competition in bulk power markets. Because a transmission provider may use its system in different ways (*e.g.*, to integrate load and resources when serving retail native load, to make off-system sales or purchases, or to serve wholesale requirements customers), the Commission set for hearing the factual issues associated with identifying those uses, as well as any potential impediments or consequences to providing comparable services to third parties.[73]

After *AEP*, the Commission applied this comparability standard to a proposed open access transmission tariff that was filed by Kansas City Power & Light Company (KCP&L) in support of proposal to sell generation at market-based

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pursuant to sections 202 and 203, and under like directives contained in sections 205, 206 and 207.' Gulf States Utilities Company v. FPC, 411 U.S. 747, 758–59 (1972)." *Id.* at 61,490 (footnote omitted). The Commission reaffirmed that it would examine how best to fulfill this responsibility, as well as its responsibility to prevent undue discrimination, in light of the changing conditions in the electric utility industry. *Id.*

[72] *Id.* at 61,490.

[73] *Id.* at 61,490–91.

rates.[74] The Commission explained that, in light of AEP, the utility's proposed open access transmission tariff (which provided only for point-to-point service) did not adequately mitigate its transmission market power so as to justify allowing the requested market-based rates. KCP&L could charge market-based rates for sales only if it modified its proposed transmission tariff to reflect the *AEP* comparability standard.

Since then, the Commission has required comparable service in a variety of contexts, and has set for hearing the factual issues associated with comparable service. For example, the Commission found that market power can be adequately mitigated only if a merged company offers transmission services in accordance with the AEP comparability standard.[75] The Commission further held that, even if a merger does not result in an increase in market power, the merger would not be consistent with the public interest under section 203 of the FPA unless the merged company offers comparable transmission services, as defined in *AEP*.[76] The Commission therefore announced a transmission comparability requirement for all new mergers:

> Given the transition of the electric utility industry as a whole, we conclude that, absent other compelling public interest considerations, coordination in the public interest can best be secured only if merging utilities offer comparable transmission services.[77]

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[74] *See* Kansas City Power & Light Company, 67 FERC ¶ 61,183 (1994), *reh'g pending*.

[75] *E.g.*, *CSW*, *supra*, 68 FERC at 61,914.

[76] *Id.*

[77] *Id.* at 61,915 (footnote omitted).

In *Heartland Energy Services, Inc.*,[78] the Commission applied its comparability standard to an affiliated electric power marketer seeking blanket authorization to sell electricity at market-based rates. The Commission explained that

> For all future cases involving blanket approval of market-based rates an offer of comparable transmission services will be required before the Commission will be able to find that transmission market power has been adequately mitigated. In the context of an affiliated power marketer, this means that all of its affiliated utilities must have a comparable transmission tariff on file.[79]

The Commission also denied a request by a company affiliated with a transmission-owning utility seeking permission to sell power at market-based rates to a particular customer. The denial was without prejudice to refiling such a request in a new section 205 proceeding, but only after the affiliated transmission-owning utility filed a comparable transmission service tariff.[80] The Commission added that it

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[78] 68 FERC ¶ 61,223 (1994).

[79] *Id.* at 62,060. In Inter Coast Power Marketing Company, 68 FERC ¶ 61,248, *clarified*, 68 FERC ¶ 61,324 (1994), the Commission rejected an affiliated marketer's proposal to sell at market rates without its affiliate utility offering comparable transmission services. The Commission stated that the only way to ensure that Inter Coast does not have transmission market power is to require its affiliated public utility to offer comparable transmission services. *See also* LG&E Power Marketing Inc., 68 FERC ¶ 61,247 at 62,120–21 (1994). The Commission added that this is consistent with encouraging competitive bulk power markets as envisioned by the Energy Policy Act of 1992. *Id.* at 62,132.

[80] *See* Hermiston Generating Company, 69 FERC ¶ 61,035 at 61,164 (1994), *reh'g pending*. The Commission subsequently accepted the rates on a cost basis. See Letter Order dated November 10,1994.

> Will require comparability in any situation in which a seller seeking market-based rates is affiliated with an owner or controller of transmission facilities.[81]

The Commission has also stated that "it will henceforth apply the transmission comparability standard announced in the *AEP* case to all transmitting utility members of an RTG."[82]

The Commission further declared that comparable services must be provided through "open access" tariffs rather than only on a contract-by-contract basis:

> (T)ariffs are essential to the provision of comparable services. Tariffs set out the services that are available and the terms and conditions under which those services will be made available * * *. (In contrast), a negotiation process creates uncertainty and imposes on customers delay and other transaction costs that the transmitting utility members of an RTG do not incur when using the transmission for their own benefit. Moreover, the ability to execute separate transmission agreements with different but similarly situated customers is the ability to

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[81] *Id.* at 61,165.

[82] *See SWRTA*, 69 FERC at 61,397; *see also* PacifiCorp, the California Municipal Utilities Association, and the Independent Energy Producers (on behalf of Western Regional Transmission Association), 69 FERC ¶ 61,099, *order on reh'g*, 69 FERC ¶ 61,352 (1994), *order on compliance filing*, 71 FERC ¶ 61,158 (1995) (*WRTA*). An RTG is a regional transmission group. It is defined as "a voluntary organization of transmission owners, transmission users, and other entities interested in coordinating transmission planning (and expansion), operation and use on a regional (and inter-regional." Policy Statement Regarding Regional Transmission Groups, 58 FR 41626 (August 5, 1993), FERC Stats. & Regs., Regulations Preambles ¶ 30,976 at 30,870 n. 4 (RTG Policy Statement).

> unduly discriminate among them. A tariff ensures against such discrimination in the RTG.[83]

Thus, the Commission required the RTGs to amend their bylaws to commit all transmitting utility members to offer comparable transmission services to other RTG members pursuant to a transmission tariff or tariffs.

As discussed below, since the AEP comparability standard was announced, the Commission has set for hearing 44 open access tariffs to determine what constitutes comparable service. This number includes tariffs filed subsequent to the Open Access NOPR. All tariffs have now been made subject to the outcome of the Final Rule.

3. Lack of Market Power in New Generation

In 1994 in the *KCP&L* case, discussed in the prior section, the Commission continued to recognize that transmission remains a natural monopoly. However, it found that, in light of the industry and statutory changes that now allow ease of market entry, no wholesale seller of generation has market power in generation from *new* facilities.[84] In particular, the Commission explained that it had previously noted in *Entergy Services, Inc.* that

> There was significant evidence that non-traditional power project developers, including qualifying facilities and independent power projects, are becoming viable competitors in long-run markets.[85]

The Commission further explained that since *Entergy*, Congress had enacted the Energy Policy Act, which had lowered barriers to the entry of new suppliers by creating a

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[83] *SWRTA*, 69 FERC at 61,398.

[84] *KCP&L*, 67 FERC ¶ 61,183 (1994).

[85] *Id.* at 61,557 (citing Entergy Services, Inc., 58 FERC ¶ 61,234 at 61,756 and nn. 63 and 65 (*Entergy*)).

new class of power suppliers—EWGs—that are exempt from the provisions of PUHCA.[86] The Commission concluded that, in considering market-based rate proposals for generation sales, it need only focus on market power in transmission, generation market power in short-run markets, and other barriers to entry.[87]

4. Further Commission Action Addressing a More Competitive Electric Industry

To address the fact that the electric industry is becoming more competitive, and to remove barriers that might inhibit a more competitive industry, the Commission has initiated a number of proceedings: Stranded Cost NOPR,[88] (2) Transmission Pricing Policy Statement,[89] (3) Pooling Notice of Inquiry,[90] (4) Regional Transmission Group (RTG) Policy Statement,[91] and (5) Notice of Inquiry on Merger Policy.[92]

In the Stranded Cost NOPR the Commission recognized that the trend toward greater transmission access and the transition to a fully competitive bulk power market could cause some utilities to incur stranded costs as wholesale

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[86] *Id.* The Commission added that "after examining generation dominance in many different cases over the years, we have yet to find an instance of generation dominance in long-run bulk power markets." *Id.*

[87] *Id.*

[88] FERC Stats. & Regs. ¶ 32,507 (1994).

[89] Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided by Public Utilities Under the Federal Power Act, 59 FR 55031 (November 3, 1994), FERC Stats. & Regs., Regulations Preambles ¶ 31,005 (Transmission Pricing Policy Statement).

[90] Inquiry Concerning Alternative Power Pooling Institutions Under the Federal Power Act, 59 FR 54851 (October 26, 1994), FERC Stats. & Regs., Notices ¶ 35,529 (1995) (Pooling Notice of Inquiry).

[91] FERC Stats. & Regs. ¶ 30,976 (RTG Policy Statement).

[92] FERC Stats. & Regs. ¶ 35,531 (1996).

requirements customers (or retail customers) use their supplier's transmission to purchase power elsewhere. As the Commission noted, a utility may have built facilities or entered into long-term fuel or purchased power supply contracts with the reasonable expectation that its customers would renew their contracts and would pay their share of long-term investments and other incurred costs. If the customer obtains another power supplier, the utility may have stranded costs. If the utility cannot locate an alternative buyer or somehow mitigate the stranded costs, the Commission explained that "the costs must be recovered from either the departing customer or the remaining customers or borne by the utility's shareholders."[93] Accordingly, the Commission proposed to establish provisions concerning the recovery of wholesale and retail stranded costs by public utilities and transmitting utilities.

In the Transmission Pricing Policy Statement, the Commission announced a new policy providing greater flexibility in the pricing of transmission services provided by public utilities and transmitting utilities. The Commission traditionally had allowed only postage-stamp, contract-path pricing.[94] Under the new policy, we will permit a variety of proposals, including distance sensitive and flow-based pricing, which may be more suitable for competitive wholesale power markets.[95] The Commission explained that

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[93] FERC Stats. & Regs. ¶ 32,507 at 32,864.

[94] Most transmission contracts set a single price for energy flow over a utility's transmission system. This single-price policy is called "postage stamp" pricing because the rate does not depend on how far the power moves within a company's transmission system. If power flows through several companies, traditional industry practice is to specify that power flows along a "contract path" consisting of the transmission-owning utilities between the ultimate receipt and delivery points. *See* Indiana Michigan Power Company, 64 FERC ¶ 61,184 at 62,545 (1993).

[95] Unlike with postage stamp pricing, with distance-sensitive pricing the cost of moving power through a company depends on how far the

this "(g)reater pricing flexibility is appropriate in light of the significant competitive changes occurring in wholesale generation markets, and in light of our expanded wheeling authority under the Energy Policy Act of 1992."[96] However, the Commission explained that any new transmission pricing proposal must meet the Commission's AEP comparability standard. The Commission further explained that comparability of service applies to price as well as to terms and conditions.[97]

The Commission issued the Pooling Notice of Inquiry to receive comments on traditional power pools and on alternative power pooling institutions that are being explored in today's more competitive environment. The Commission expressed concern that

> (G)iven the ongoing changes in the competitive environment of the electric utility industry—in particular, the potential for substantially increased access to transmission—we must consider whether we are appropriately balancing our dual objectives of promoting coordination and competition.[98]

Accordingly, the Commission explained that it wished to look at alternative power pooling institutions and to re-examine the role of more traditional power pools in today's environment of increased competition. In particular the Commission expressed its intent to ensure that its policies

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power moves within the company. In contrast to contract path pricing, flow-based pricing establishes a price based on the costs of the various parallel paths actually used when the power flows. Because flow-based pricing can account for all parallel paths used by the transaction, all transmission owners with facilities on any of the parallel paths could be compensated for the transaction.

[96] FERC Stats. & Regs. ¶ 31,005 at 31,136.

[97] *Id.* at 31,142.

[98] FERC Stats. & Regs. ¶ 35,529 at 35,715.

"are consistent with the development of a competitive bulk power market." [99]

In the RTG Policy Statement, the Commission announced a policy encouraging the development of RTGs. The Commission explained that a primary purpose of RTGs is to facilitate transmission access for potential users and voluntarily resolve disputes over such service. The Commission has approved the formation of three RTGs.[100] One of the conditions is that each RTG member must offer comparable transmission services by tariff to other RTG members.

In the merger NOI, the Commission indicated that it will review whether its criteria and policy for evaluating mergers need to be modified in light of the changing circumstances occurring in the electric industry.

In addition to the Commission's actions, a number of states have initiated proceedings concerning retail wheeling or proposed legislation for retail wheeling, that is, for ultimate consumers to choose their supplier of power, or other restructuring proposals.[101]

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[99] *Id.* at 35,714. As explained below, the Commission held technical conferences on issues surrounding power pools and competition.

[100] *See WRTA* and *SWRTA*, *supra*, and Northwest Regional Transmission Association, 71 FERC ¶ 61,397 (1995).

[101] At least 12 states have retail wheeling proposals, legislation, or pilot programs underway—Alabama, California, Connecticut, Illinois, Massachusetts, Michigan, New Hampshire, New York, Ohio, Rhode Island, Vermont, and Wisconsin. At least 14 other states are investigating retail wheeling. Currently, according to a report of the NARUC-affiliated National Council on Competition and the Electric Industry, 41 States are actively involved in investigating whether and how to restructure their respective electric power markets. Of this total, 29 State regulatory authorities * * * have initiated investigations. In addition, five State legislatures are involved in similar investigations, while seven other States have joint regulatory/legislative proceedings underway.

5. Events Since Issuance of Open Access NOPR

Since issuance of the Open Access NOPR, public utilities have filed, in some form or another, 47 open access tariffs. In acting on those filings, the Commission has made all of the non-rate terms and conditions of those proposed tariffs subject to the outcome of this Final Rule.[102]

Over the last year, the Commission also has received and analyzed more than 20,000 pages of comments that were received from over 400 commenters, as well as additional information provided by industry participants at a number of Commission-initiated technical conferences.[103] Those technical conferences addressed several issues—ancillary services, pro forma tariffs, power pools, and ISOs—and provided significant input to the Commission's formulation of this Final Rule.

F. Need for Reform

The many changes discussed above have converged to create a situation in which new generating capacity can be built and operated at prices substantially lower than many utilities' embedded costs of generation. As discussed above, new generation facilities can produce power on the grid at a cost of less than 3 cents per kWh to 5 cents per kWh, yet the costs for large plants constructed and installed over the last

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Testimony of the Honorable Cheryl L. Parrino, Chair of the Wisconsin Public Service Commission, on behalf of the National Association of Regulatory Utility Commissioners, before the United States Senate Committee on Energy and Natural Resources (March 6, 1996).

[102] *See* American Electric Power Service Corporation, *et al.*, 72 FERC 61,287 at 61,238 (1995).

[103] Attached to this Final Rule as Appendix B is a list of commenters and the abbreviations used to designate them, including those commenters that filed late.

decade were typically in the range of 4 to 7 cents per kWh for coal plants and 9 to 15 cents for nuclear plants.

Non-traditional generators are taking advantage of this opportunity to compete. Indeed, the non-traditional generators' share of total U.S. electricity generation increased from 4 percent in 1985 to 10 percent in 1993.[104] Much of this increased share of generation is the result of competitive bidding for new generation resources that has occurred in 37 states. Since 1984, almost 4,000 projects, representing over 400,000 MW, have been offered in response to requests. Over 350 projects have been selected to supply 20,000 MW, and, of these, 126 are now online producing almost 7,800 MW of power.[105]

In addition, the cost of utility-generated electricity differs widely across the major regions of the United States. Average utility rates range from 3 to 5 cents in the Northwest to 9 to 11 cents in California. Electricity consumers are demanding access to lower cost supplies available in other regions of the United States, and access to the newer, lower cost generation resources. Therefore, it is important that the non-traditional generators of cheaper power be able to gain access to the transmission grid on a non-discriminatory open access basis.

The Commission's goal is to ensure that customers have the benefits of competitively priced generation. However, we must do so without abandoning our traditional obligation to ensure that utilities have a fair opportunity to recover prudently incurred costs and that they maintain power supply reliability. As well, the benefits of competition should not come at the expense of other customers. The Commission believes that requiring utilities to provide non-discriminatory open access transmission tariffs, while simultaneously

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[104] Energy Information Administration, *Performance Issues for a Changing Electric Power Industry* (January 1995) 10 and (Figure 5).

[105] Current Competition, November 1994, Vol. 5, No. 8, at 8.

resolving the extremely difficult issue of recovery of transition costs (discussed *infra*), is the key to reconciling these competing demands.

Non-discriminatory open access to transmission services is critical to the full development of competitive wholesale generation markets and the lower consumer prices achievable through such competition.[106] Transmitting utilities own the transportation system over which bulk power competition occurs and transmission service continues to be a natural monopoly. Denials of access (whether they are blatant or subtle), and the potential for future denials of access, require the Commission to revisit and reform its regulation of transmission in interstate commerce. As discussed in detail in Section IV.B., such action is required by the FPA's mandate that the Commission remedy undue discrimination.

Since the time the NOPR issued, the Commission staff has completed an FEIS that provides a quantitative estimate of some of the cost savings expected from this Rule: approximately $3.8 to $5.4 billion per year. Other non-quantifiable benefits are also expected from this Rule and include: (1) Better use of existing assets and institutions; (2) new market mechanisms; (3) technical innovation; and (4) less rate distortion. These potential benefits to the Nation's electricity consumers and the economy as a whole confirm the need to take generic action to remove barriers to competition. In what follows, we set out the changes necessary to remedy undue discrimination and to ensure a fair transition to a more competitive regulatory regime.

IV. Discussion

A. Scope of the Rule

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[106] As discussed above, a significant number of public utilities still do not have any form of an "open access" tariff on file with the Commission and no public utility has on file a non-discriminatory open access tariff as defined by this Rule.

1. Introduction

The Commission has determined that non-discriminatory open access transmission services (including access to transmission information) and stranded cost recovery are the most critical components of a successful transition to competitive wholesale electricity markets. These issues are the focal point of this Rule, the accompanying rule on open access same-time information systems, and the accompanying proposed rule on capacity reservation tariffs.

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No. 00-1052

IN THE
Supreme Court of the United States

UTILITIES COMMISSION, CITY OF NEW SMYRNA BEACH, FLORIDA,
Petitioner,

v.

TAMPA ELECTRIC COMPANY, FLORIDA POWER & LIGHT COMPANY, and FLORIDA POWER CORPORATION,
Respondents.

On Petition For a Writ of Certiorari to the Supreme Court of the State of Florida.

FLORIDA POWER CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JAMES A. MCGEE
Senior Counsel
FLORIDA POWER CORPORATION
Post Office Box 14042
St. Petersburg, FL 33733-4042
(727) 820-5184

Counsel for Respondent Florida Power Corporation

GARY L. SASSO
Counsel of Record
SYLVIA H. WALBOLT
JOSEPH H. LANG, JR.
CARLTON FIELDS WARD EMMANUEL SMITH & CUTLER, P.A.
200 Central Avenue, Ste. 2300
Post Office Box 2861
St. Petersburg, FL 33731
(727) 821-7000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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CORPORATE DISCLOSURE STATEMENT

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Circelli, Competition In Electric Market Urged, *The Palm Beach Post* (Jan. 9, 2001) 5

Flanigan, Texas Power Suppliers Shun Bad Guy Label; Firms Say California Ignored Advice And Failed To Deal With The Realities Of A 'New' Economy, *Los Angeles Times* (Jan. 14, 2001) 4

Florida PSC Delays Until Dec. 27 Vote On Four Merchant Plants, 3,158 MW, *Global Power Report* (Dec. 8, 2000) 6

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Wald, Negotiators Work on Plan For California Energy Trouble, *The New York Times* (Jan. 13, 2001)	6
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STATEMENT OF THE CASE

This case involves a straightforward application of the Florida Electrical Power Plant Siting Act (the "Siting Act"). Unlike many states, Florida has not yet deregulated its electric utility industry (although, as discussed below, the State is studying the issue at this time). Under existing law, only authorized electric utilities in Florida may legally sell electric power at retail to consumers in the State.

When a regulated utility determines that it needs additional generating capacity to serve its retail load, the utility may construct a new facility or it may contract to buy such power at wholesale. If the utility wants to build, or contract with a wholesale supplier to build, a large electric power plant—i.e., a power plant with a steam component of 75 megawatts ("MW") or more—the utility must get approval to site the power plant under the Siting Act. By this means, the Florida Legislature has sought to ensure that electric utilities obligated to serve customers in Florida may obtain approval to build power plants to meet their need for reliable generating capacity, while protecting against an unwarranted proliferation of large electric power plants detrimental to the State's fragile environment. *See* Fla. Stat. § 403.502 (2000).

To proceed under the Siting Act, an investor-owned utility like Florida Power Corporation must issue a request for proposals to solicit bids from wholesale power plant developers. *See* Fla. Admin. Code § 25-22.082(2). This provides a competitive point of entry to all in-state or out-of-state wholesale providers. The utility then has the obligation under State law to select the most cost-effective proposal to meets its generating needs. *Ibid.*; Fla. Stat. § 403.519 (2000). Thus, a utility may not pass up competitive options in the wholesale market unless the utility is able to propose a *more* competitive self-build alternative.

To get approval to build a plant, the utility must show that it actually needs the plant to serve identified retail load and that the plant will thus not impose an *avoidable and unwarranted* impact on the State's environment. *See* Fla. Stat. § 403.519 (2000); *see also* §§ 403.502(3), 403.507(2)(a)(2), & 403.508(3) (2000). Contrary to Petitioner's unsubstantiated assertions, there is no indication in the record in this case or in the legislative history of the Siting Act that the law was enacted to protect the economic interests of Florida utilities. The Siting Act restricts the development of *all* large power plants in the State, whether built by in-state utilities or out-of-state power plant developers.

The law was developed by the Florida House Environmental Protection Committee to ensure that utilities did not "go[] out and build[] any power plants [they] don't need," and to require Florida regulators to "balance the considerations of the need for additional power with . . . ecological considerations." (Rep. Andrews, Chair of Subcommittee on Permits of the House of the Environmental Protection Committee; R9-1765-1821). To achieve this purpose, the Legislature ordained that the State must "make a determination that *there is in fact a need* that has to be served, and *then balance the ecological considerations* with that need." *Ibid.* (emphasis added). Thus, contrary to what Petitioner contends, the Florida need certification procedure is a crucial threshold step in effectuating the Siting Act's objective of protecting the State's sensitive environment against undue impact.

Florida utilities engage in ongoing planning concerning their system needs. To discharge their obligation to serve, Florida utilities must plan for electric generating capacity they can rely upon. In this connection, regulated electric utilities in Florida must maintain adequate "reserves" to

assure that they can serve their retail load in times of extreme weather, outages, or other exigencies. Under the long-standing policy of the Florida Public Service Commission ("PSC"), a utility may count toward its reserves only generating capacity that *it owns or has under firm contract*, to ensure that the capacity will be available to the utility when the utility actually needs it (thus avoiding the kind of power shortages occurring now in California and other parts of the country). (T3-417, 444, T4-537-38).

Accordingly, an applicant seeking approval to site a new power plant under the Siting Act must demonstrate that the plant will be utility-owned or contractually committed to meet the need for generating capacity that the proponent of the plant proposes to satisfy. This requirement applies across the board, whether the proposed plant will be developed by a Florida utility, a Florida independent power producer, or an out-of-state power plant developer. This requirement was not announced for the first time by the Florida Supreme Court in this case, but represents a long-standing interpretation of the Siting Act by the Florida PSC and the Florida Supreme Court. *See Nassau Power Corp. v. Deason*, 641 So. 2d 396 (Fla. 1994); *Nassau Power Corp. v. Beard*, 601 So. 2d 1175 (Fla. 1992); *In re: Petition of Nassau Power Corp.*, 1992 Fla. PUC LEXIS 1557, Order No. PSC-92-1210-FOF-EQ (PSC Oct. 26, 1992).

In this case, the Petitioner, Utilities Commission, City of New Smyrna Beach ("the City" or "Petitioner"), wanted to contract with Duke Energy New Smyrna Beach Power Co., Ltd., L.L.P. ("Duke") to build a 530MW power plant to meet Petitioner's 30MW need for additional generating capacity. (R1-15). Petitioner actually needed—and contracted for—only 30MW of the capacity and energy that would be produced by the much larger plant. Although Duke sought authority to build its plant based on its professed intent to

meet the needs of other load-serving utilities in Peninsular Florida, Duke made no effort to negotiate or enter into contracts with other load-serving utilities and, in fact, expressly refrained from doing so. (Exh. 2, ¶ A(4); T4-540, 546-49, 595). Accordingly, Duke and the City were unable to demonstrate that any other load-serving utility *actually needed the proposed plant* or that any other utility could count on the plant for reliable supply during power shortages.

Nonetheless, Duke and the City attempted to persuade—and ultimately did persuade—the PSC, by a 3-2 vote, to take it upon itself to depart from the long-standing precedent of the PSC and the Florida Supreme Court and permit Duke to site the plant based on speculation that Duke might be able to negotiate sales to unidentified load-serving utilities in Peninsular Florida after the plant was already built and had impacted the State's environment. In doing so, the PSC embraced the argument advanced by Duke and the Petitioner that existing Florida law authorized the siting of "merchant" plants—plants that are detached from any identified need of load-serving utilities or any commitment to meet their need. The role of merchant plants in a *deregulated* electric market lies at the center of the current controversy in California. *See* Oppel, Independent Plants Play Role In Electricity Troubles, *The New York Times*, (Jan. 23, 2001); Flanigan, Texas Power Suppliers Shun Bad Guy Label; Firms Say California Ignored Advice And Failed To Deal With The Realities Of A 'New' Economy, *Los Angeles Times* (Jan. 14, 2001); Tracy, Could Power Troubles Happen in Florida, Too?, *Orlando Sentinel* (Jan. 1, 2001).

With a 6-1 vote (with Anstead, J., dissenting) the Florida Supreme Court reversed, correctly determining that existing law did not authorize the siting of power plants that were not committed to serving identified needs of particular load-serving utilities: "The projected need of unspecified utilities

throughout peninsular Florida is not among the authorized statutory criteria for determining whether to grant a determination of need . . . ." *Tampa Electric Co., et al. v. Garcia, et al.*, 767 So. 2d 428, 436 (Fla. 2000). Concluding that the PSC had put the cart before the horse in acting to approve the proposed Duke plant without statutory enabling authority, the court stated "that the Legislature must enact express statutory criteria if it intends such authority for the PSC." *Id.* at 435. The court rejected Petitioner's constitutional challenges based on its determination that Congress had expressly delegated to the states the authority for regulating the matters at issue in this case. *Id.* at 436.

Thereafter, the Governor of Florida established a broad-based Florida Energy 2020 Study Commission ("Study Commission") to evaluate and propose legislative changes in the electric industry to meet the needs of the State over the next 20 years. The Study Commission convened on September 13, 2000 to begin its work. *See* Meeting Minutes, Florida Energy 2020 Study Commission, Sept. 13, 2000, Tallahassee, Florida (http://www.myflorida.com/myflorida/communities/learn/agenda_sept00.html) (visited Jan. 16, 2001). Under its charge, the Study Commission must make its recommendations by December 1, 2001, for any legislative changes that it wishes to propose. The Study Commission has bifurcated its proceedings, however, and announced its intention to address as its first order of business the siting of wholesale generating plants. *See* Circelli, Competition In Electric Market Urged, *The Palm Beach Post* (Jan. 9, 2001). Depending upon the outcome of this legislative review, the current statutory framework, and the Florida Supreme Court's decision in this case, may be overtaken by events in the upcoming months.

ARGUMENT

This case does not warrant plenary review by this Court. As the Florida Supreme Court correctly held, Congress has entrusted the states with the authority to regulate the matters at issue in this case. In rejecting Petitioner's constitutional challenge on this basis, the Florida Supreme Court faithfully followed long-settled precedent of this Court. Thus, the court's decision most assuredly does *not* conflict with controlling decisions of this Court; rather, it implements them.

Further, it is common knowledge that Congress, the Federal Energy Regulatory Commission ("FERC"), state legislatures, and state regulators all around the country are actively addressing the complex issues associated with deregulation of the electric industry through ever-changing legislation and regulation. *See, e.g.*, Wald, Negotiators Work on Plan For California Energy Trouble, *The New York Times* (Jan. 13, 2001); Yardley, Texas Learns in California How Not To Deregulate, *The New York Times* (Jan. 10, 2001). This is not an area—like antitrust—where Congress has long ago cast its directives in stone, leaving to this Court the responsibility to safeguard federal interests and ensure nationwide uniformity. The federal and state legislatures—within limits that were well-respected in this instance—are actively monitoring and adapting to evolving industry developments. In this regard, ongoing legislative developments in Florida may well overtake and eclipse the practical significance of the Florida Supreme Court's decision in this case. Indeed, Duke has not joined Petitioner in bringing this case to this Court. To the contrary, Duke has publicly stated that it "had no plans to file with a higher court" and instead was working with the Florida Energy 2020 Study Commission and the Florida Legislature to change the Siting Act. *See* Florida PSC Delays Until Dec. 27 Vote On

Four Merchant Plants, 3,158 MW, *Global Power Report* (Dec. 8, 2000).[1]

I. Neither the National Energy Policy Act nor FERC Order 888 Preempts Florida's Siting Act.

Petitioner asserts that this Court should grant certiorari to review the decision below because the "Florida court's interpretation" of the Siting Act "is inconsistent with the goals and policies of federal law intended to promote competition in the United States electric utility industry," namely the Energy Policy Act of 1992 and FERC's Order 888. (Petition, at 11). Of course, this Court may not substitute its own interpretation of the Siting Act for that given by the Florida Supreme Court. *See Gurley v. Rhoden*, 421 U.S. 200, 208 (1975) ("a State's highest court is the final judicial arbiter of the meaning of state statutes"); *see generally Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974). In any event, Petitioner's argument falls far short of the mark.

As a threshold matter, this Court has "frequently indicated" that " '[p]re-emption of state law by federal statute or regulation is not favored "in the absence of persuasive reasons—either that the nature of the regulated subject matter permits *no other conclusion*, or that the Congress has

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[1] In North Carolina, Duke's parent successfully supported a rule of law for siting new power plants like the rule in Florida challenged by the Petitioner in this case. *See Re Empire Power Co.*, Docket No. SP-91 (N.C. Utils. Comm'n Apr. 23, 1992), *aff'd sub nom. Empire Power Co. v. Duke Power Co.*, 437 S.E.2d 540 (N.C. Ct. App. 1993). North Carolina, like Florida, has created a study commission to evaluate whether, when, and how to introduce deregulation of the electric utility industry in that state. *See* Study Commission on the Future of Electric Service in North Carolina, Report to the 1999 General Assembly of North Carolina, 2000 Regular Session (http://www.ncuc.commerce.state.nc.us/electric/study1-.htm) (visited Jan. 18, 2001).

unmistakably so ordained." ' " *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981) (collecting cases; emphasis added). By the same token, Petitioner may not prevail in its challenge by relying, as it does, upon the general "goals and policies of federal law." This Court has made plain that, "In cases such as this, it is necessary to look beyond *general expressions* of 'national policy' to specific federal statutes with which the state law is claimed to conflict," to find a "specific basis" to support a claim of preemption. *Id.* at 634, 636 (emphasis added).

Here, the City does not and cannot say that either the Energy Policy Act or FERC Order 888 expressly precludes the states from regulating the construction of new power plants in the way that Florida has, or in any other way for that matter. This is for good reason. Section 731 of the Energy Policy Act preserves state and local authority over the siting of facilities and environmental protection, as follows:

> Nothing in this title or any amendment made by this title shall be construed as affecting or intending to affect, *or in any way to interfere with*, the authority of any state or local government relating to environmental protection or the siting of facilities.

15 U.S.C. § 79, Historical and Statutory Notes (emphasis added).

Indeed, Petitioner's own policy witness, Martha Hesse, a former chairman of FERC, conceded at the hearing that the need proceeding in this case was exactly the kind of proceeding left by federal law to the states, and she refused to opine that federal law foreclosed the state-law approach that Petitioner challenges in this case, saying instead that federal law was *silent* on such matters. (T7-1006, T8-1020-25).

The fact is, the Energy Policy Act and FERC Order 888 did not mandate wholesale competition in all ways at all times,

regardless of state law, as the City would have this Court believe. Rather, in enacting the Energy Policy Act, Congress purposely focused its work on transmission access and exemption from federal securities regulation, leaving to the states their historic role of determining whether and in what circumstances new generation facilities might be needed and sited. Thus, Congress legislated in this area with a scalpel, not a meat-ax.

Sensitive to the long-standing division of federal and state authority over issues of transmission and generation, this Court rejected a far more compelling federal preemption challenge than the City's in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983), a case on which Petitioner relies. In that case, the Court held that states were free to impose a broad *moratorium* on the construction of nuclear power plants on *economic grounds*, despite federal legislation—the Atomic Energy Act—that explicitly promoted nuclear energy. The Court stated, "There is little doubt that a primary purpose of the Atomic Energy Act was, and continues to be, the promotion of nuclear power." *Id.* at 221. The Court nonetheless held that "the states have been allowed to *retain authority over the need for electrical generating facilities* [] sufficient to permit a state so inclined to *halt the construction of new nuclear plants by refusing on economic grounds to issue certificates of public convenience in individual proceedings*." *Id.* at 216 (emphasis added). Further, the Court recognized that, since the states were "certainly free to make these decisions on a case-by-case basis, *a state is not foreclosed from reaching the same decision through a legislative judgment, applicable to all cases*." *Id.* at 215 (emphasis added). The Court observed, "*it should be up to Congress* to determine whether a state has misused the authority left in its hands." *Id.* at 216 (emphasis added).

Here, too, in the final analysis, amorphous arguments about a general federal policy of promoting wholesale competition must give way to the paramount and long-recognized interests of the State in ensuring the orderly development of power plants within its jurisdiction and its enforcement of comprehensive regulatory schemes designed to assure adequate and reliable electric service for its citizens. When and if Congress sees fit to regulate in this area itself, Congress will do so.

II. The Commerce Clause Does Not Prohibit Application of the Siting Act to this Case.

Petitioner next contends that certiorari is warranted in this case because the "dormant" aspect of the Commerce Clause precludes the State from conditioning the development of new power plants by independent power producers on a demonstration that such plants are needed, as evidenced by contracts with retail utilities. This argument, too, does not merit plenary consideration by this Court.

The Commerce Clause, of course, does not expressly prohibit anything. Rather, it is an affirmative grant of lawmaking authority to Congress to "regulate Commerce . . . among the several States." U.S. Const. Art. I, Sec. 8, cl. 3. Thus, when Congress elects to confer upon the states the prerogative of regulating in a particular area, the Commerce Clause itself does not act to inhibit such state regulation. *E.g.*, *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980).

In this instance, Congress has plainly preserved to the states their traditional role of regulating the need for generating facilities and the terms upon which facilities may be sited. As discussed above, Section 731 of the Energy Policy Act specifically preserves state authority over the siting of facilities and the protection of the environment.

Further, this Court explicitly recognized in *Pacific Gas* that the "*[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States.*" 461 U.S. at 205 (emphasis added); *see also id.* at 212 (referring to the states' "traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like"); *id.* at 194 (referring to "the exercise of [] historic state authority over the generation and sale of electricity"). *See also Monongahela Power Company*, 40 FERC ¶ 61,256 (Sept. 17, 1987) ("jurisdiction over the *capacity planning, determination of power needs, plant siting, licensing, construction,* and the operations of [power] plants ha[s] been deliberately withheld from [FERC's] control or responsibility" and "preserved [to] the States[]") (emphasis added). Accordingly, this is not a situation where Congress has—through inattention—omitted to regulate issues that should be off-limits to states under some "dormant" aspect of the Commerce Clause. Rather, this case involves an area of regulation that Congress has traditionally and consistently relegated to the states.

Even if Congress may be thought to have overlooked this area of regulation, however, and thus even if the "dormant" Commerce Clause may be thought to apply in this case, the Florida statute would readily survive constitutional scrutiny under this Court's well-settled precedent. The City contends, basically, that Florida law places Florida-regulated utilities in a favored position, making the need of those utilities determinative in a need proceeding. This Court rejected a similar challenge under the Commerce Clause in *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997).

The Court in that case upheld a tax by the State of Ohio that applied to unbundled power marketing sales by an interstate gas distributor, but that exempted competitive sales

by in-state regulated utilities. The Court began by tracing the history of regulation in the gas and electric industries, observing that state regulation emerged in the early part of this century after "then-recent experiments with free market competition in the manufactured gas and electricity industries had dramatically underscored the need for comprehensive regulation . . . ." *Id.* at 288.

In sustaining Ohio's differential tax treatment of state utilities and interstate power marketers, the Court pointed out:

> Conceptually, of course, any notion of discrimination assumes a comparison of *substantially similar entities*. Although this central assumption has more often than not itself remained dormant in this Court's opinions on state discrimination subject to review under the dormant Commerce Clause, when the allegedly competing entities provide different products, as here, there is a threshold question whether the companies are indeed similarly situated for constitutional purposes.

Id. at 298-99 (footnote omitted; emphasis added). In that case, the Court recognized that regulated utilities provide "bundled" services that benefit smaller consumers. "While this captive market is not geographically distinguished from the area served by the independent marketers, it is defined economically as comprising consumers who are captive to the need for bundled benefits." *Id.* at 301. Although regulated utilities competed directly with power marketers for larger, non-captive customers, the Court held that Ohio was justified in treating them differently, "*giv[ing] greater weight to the captive market and the local utilities' singular role in serving it* . . . ." *Id.* at 304 (emphasis added).

The Court noted there, as in *Pacific Gas*, that "should intervention by the National Government be necessary, Congress has both the resources and the power to strike the

balance between the needs of the competitive and captive markets." *Ibid.* (emphasis added). Accordingly, the Court rejected the challenge of the power marketers to Ohio's regulatory approach. *See also Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375, 377, 395 (1983) ("the regulation of utilities is one of the most important functions traditionally associated with the police power of the States").

As in *Tracy*, the retail utilities in Florida are assigned a critical role in need proceedings not out of some purpose to favor their economic interests, as Petitioner asserts, but because they alone are statutorily obligated to serve the ultimate consumers in the State. The City nowhere *challenges the constitutionality of this exclusive retail service arrangement.* In fact, in its Petition, the City makes clear that it does "*not* imply any constitutional limit to the PSC's existing authority to regulate in-state retail utilities." (Petition at 29; emphasis added). Yet, it is on *account of the exclusive retail service provided by PSC-regulated Florida utilities* that any wholesale provider who seeks to meet the needs of this State *must* deal with those utilities. This is not economic protectionism, but a rational, incontestably proper means to regulate the provision of the vital service of electric power in a way that balances the need for a reliable power supply with the State's interests in protecting its environment.

Petitioner relies in this Court, as it did below, on this Court's earlier decision in *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982) invalidating under the Commerce Clause New Hampshire's directive that the owner of an *existing* hydroelectric plant that participated in a regional New England Power Pool alter its historic pattern of interstate *billing* in order to provide the economic benefits of its interstate power sales to New Hampshire. The utility had historically made most of its sales in Massachusetts and

Rhode Island, selling only 6 percent of its output in New Hampshire.

The *New England Power* case did not involve the states' traditional regulatory control over the development of, and need for, *new* generating facilities within a state. The case did not involve any local interest at all, except for sheer economics. *See id.* at 336, 339. Although the Court explicitly recognized that "Congress may use its powers under the Commerce Clause to '[confer] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy," *id.* at 340, the Court held that, with regard to the special area of hydroelectric energy, Congress explicitly preserved only those state laws *then* in existence at the time the Federal Power Act was adopted, *id.* at 341.

Unlike the situation in *New England Power*, what is at issue here is the State's exercise of its traditional power to regulate whether and in what circumstances *new* power plants may be built in this State. In enforcing the existing legislative scheme in this State, the Florida Supreme Court did not seek to serve some perceived economic interest, but rather to effectuate the important legislative determination that new power plants should not be constructed in Florida unless they are demonstrably needed.[2]

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[2] Petitioner contends that the need determination at issue here is "indistinguishable" from the "equally exclusionary" certification requirement struck down in *Buck v. Kuykendall*, 267 U.S. 307 (1925). (Petition at 23). Yet the language Petitioner quotes from *Buck* demonstrates the difference. There, the point of certification was the "prohibition of competition," whereas here the determination of need is made "with a view to . . . conservation." *Id.* at 315-16. For this reason, too, Petitioner is mistaken in contending that any burden imposed by this law on interstate commerce is unwarranted and unjustified.

III. Further Judicial Involvement is Unwarranted.

Fundamentally, what is at issue in this case is the manner in which one state, Florida, is seeking to discharge traditional state prerogatives and responsibilities to ensure a reliable and adequate supply of electricity while protecting the State's sensitive environment. Congress and FERC have taken well-defined steps to alter the regulatory landscape in this industry, and Florida—like virtually every other state—is considering legislative change within its sphere of authority to adapt to a changing industry. In a case such as this, where this Court is called upon to assess, and to some extent anticipate, what Congress wants, it is the far better course to let Congress speak for itself, with the benefit of whatever action or inaction the various states may take in experimenting with different means to manage these complex issues.

The widely reported debacle in California makes clear that deregulation of the electric utility industry and the concomitant introduction of "wholesale competition" is a multifaceted issue—not a constitutional talisman—that courts are ill-equipped to handle. The subject is tailor-made for legislative hearings and initiatives, and this process is taking place in Florida at this time.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Certiorari.

Respectfully submitted,

JAMES A. MCGEE
Senior Counsel
FLORIDA POWER CORPORATION
Post Office Box 14042
St. Petersburg, FL 33733-4042
(727) 820-5184

Counsel for Respondent Florida Power Corporation

GARY L. SASSO
Counsel of Record
SYLVIA H. WALBOLT
JOSEPH H. LANG, JR.
CARLTON FIELDS WARD EMMANUEL SMITH & CUTLER, P.A.
200 Central Avenue, Ste. 2300
Post Office Box 2861
St. Petersburg, FL 33731
(727) 821-7000

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IN THE

Supreme Court of the United States

UTILITIES COMMISSION, CITY OF NEW SMYRNA BEACH, FLORIDA,

Petitioner,

v.

TAMPA ELECTRIC COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION FOR RESPONDENT FLORIDA POWER & LIGHT COMPANY

MATTHEW M. CHILDS, P.A.
CHARLES A. GUYTON
STEEL HECTOR & DAVIS LLP
215 South Monroe Street
Suite 601
Tallahassee, Florida 32301
(850) 222-2300

ALVIN B. DAVIS, P.A.
Counsel of Record
JOHN T. BUTLER, P.A.
GABRIEL E. NIETO
STEEL HECTOR & DAVIS LLP
200 South Biscayne Boulevard
Suite 4000
Miami, Florida 33131
(305) 577-7000

Attorneys for Respondent
Florida Power & Light Company

164938

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

4 OPP

STATEMENT PURSUANT TO RULE 29.6

Respondent, Florida Power & Light Company, is a wholly owned subsidiary of FPL Group Inc. which is publicly traded.

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Northwest Cen. Pipeline Corp. v. Corporation Comm'n of Kansas, 489 U.S. 493 (1988) ... 21, 22, 25

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FLA. STAT. § 403.509 (2000) 5

FLA. STAT. § 403.519 (2000) ..... *passim*

Ill. COMP. STAT. ANN. ch. 220, para. 5/8-406 (2000) 24

KY. REV. STAT. ANN. § 278.020 (Michie 1998) 24

KY. REV. STAT. ANN. § 278.025 (Michie 1998) 24

MINN. STAT. § 116C.53 (2000) 24

MINN. STAT. § 216B.243 (2000) 24

MISS. CODE ANN. § 77-3-11 (2000) 24

MISS. CODE ANN. § 77-3-14 (2000) 24

N.C. GEN. STAT. § 62-110.1 (Michie 2000) 24

P.L. 102-486 § 731, Title VII, Sub. C, 1992 U.S.C.C.A.N. (106 Stat.) 2776 (Oct. 24, 1992) 2, 10, 18

Cited Authorities

Page

Other Authorities:

Berthelsen, *Genesis Of State's Energy Fiasco: String of bad decisions on deregulation could end up costing consumers $40 billion*, San Francisco Chronicle (Dec. 31, 2000), *http://www.sfgate.com/cgi-bin/article.cgi?f'/chronicle/archive/2000/12/31/MN167927.DTL* 24

Berthelsen and Winokur, *State Probing Power Companies Scheme?*, San Francisco Chronicle (Jan. 14, 2001), *http://www.sfgate.com/cgi-bin/article.cgi?file' chronicle/archive/2001/01/14/MN115295.DTL* 24

Florida Public Service Commission, *Listing of Electric Utilities, http://www.psc.state.fl.us/mcd/*MCD-E.html 2, 3

In re: Adoption of Numeric Conservation Goals and Consideration of National Energy Policy Act Standards (Section 111), 94 FPSC 10:392 (1994) 4

In re: Generic Investigation into Planning and Operating Reserve Practices of Peninsular Florida Generating Electric Utilities, 94 FPSC 10:203 (1994) 4

Cited Authorities

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In re: Hearings on Load Forecasts, Generation Expansion Plans and Cogeneration Prices for Peninsular Florida's Electric Utilities, 89 FPSC 12:294 (1989) 8

In re: Investigation into the Adequacy of the Elec. Transmission Grid in North Florida, 90 FPSC 12:519 (1990) 4

In re: Petition of Nassau Power Corp. to Determine Need for Electrical Power Plant (Okeechobee County Generation Facility), 92 FPSC 10:643 (1992) 8

Monogohela Power Co., 40 FERC & 61,256 (September 17, 1987) 10

Oppel, *Independent Firms a Growing Factor in Latest Energy Crisis*, New York Times (Jan. 23, 2001) 24

Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21540 (April 24, 1996) 10, 11, 16, 18

Purdom, *California's Power Crisis Replays Familiar Theme,* New York Times, (Jan. 25, 2001), *http://www.nytimes.com/2001/01/25/national 25CALI.html* 24

Cited Authorities

Page

United States Fish & Wildlife Service, *Listed Species by State/Territory, http://ecos.fws.gov/webpage/usmap.html* 4

United States Fish & Wildlife Service, *Southeast Wetlands, http://wetlands.fws.gov/Pubs_Reports/Sewet/index.html* 4

INTRODUCTION

Through a carefully crafted series of statutes and regulations, the State of Florida has created a mechanism for balancing the ever-increasing energy demands of a growing population with the essential need to protect its fragile and constantly challenged natural environment. It has done so with a clear understanding of its rights and limitations in areas in which federal activity plays a necessary role.

The Supreme Court of Florida, in the decision challenged here, has simply enforced Florida law in a manner consistent with the need, articulated in the relevant statutes, to examine all of the relevant factors before depositing a large new power plant project on Florida's diminishing landscape.

Petitioner, the City of New Smyrna Beach, Florida ("Petitioner") shares none of the state's concerns. It has a narrow economic interest. It ignores the absolutely fundamental balancing required by law and common sense and invites this Court to do the same.

At issue, in particular, is Section 403.519 of the Florida Statutes (hereinafter the "Need Provision"), which requires the sponsor of a large new steam electrical power plant to demonstrate that it is necessary to meet the needs of specified retail users. Petitioner contends that this requirement is preempted by Federal law or, alternatively, contrary to dormant Commerce Clause jurisprudence. In so arguing, it rips the Need Provision from its regulatory fabric and, characterizing it in improper and unintended isolation, invokes the facile mantra of "economic protectionism." As is evident from both its structure and history, the Need Provision, fairly examined, furthers environmental and conservation goals by fostering disciplined growth of the electric power generation system in Florida. And it does so in a manner that is reasonable and nondiscriminatory.

The Florida legislature has found the adverse effects of overbuilding large power plants to be so undesirable and irreversible that new plants may be built only after a showing of public necessity. Accordingly, the Need Provision requires a threshold showing that a proposed plant is both needed and cost-effective, and that the demand the plant would serve cannot be mitigated through energy conservation programs. The Supreme Court of Florida determined that the plant proposed by Petitioner and its co-petitioner below, Duke Energy New Smyrna Beach Power Company, Ltd. LLP ("Duke") should not be allowed simply because there had been no attempt to make this threshold showing.[1]

The Need Provision operates within an area that Congress has expressly reserved to the states. Indeed, a recurring theme appears in federal electric power legislation: the areas of power plant siting, generation planning and environmental protection have invariably been left to the states to regulate. The very statute that the Petition claim preempts Florida law actually preserves state power over "environmental protection [and] the siting of facilities."[2] The Need Provision falls squarely within the ambit of this express reservation of state power.

STATEMENT OF THE CASE AND OF THE FACTS

I. THE FLORIDA REGULATED ELECTRICAL POWER SYSTEM

Electrical energy in Florida is provided to retail customers by 33 municipally-owned utilities, 5 investor-owned utilities ("IOUs"), including respondent Florida Power & Light Company, and 16 electric cooperatives, each serving a distinct territory. Florida Public Service Commission, *Listing of Electric*

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1. Although Duke was a party to the proceedings below, it has not petitioned for review in this Court.

2. P.L. 102-486 § 731, Title VII, Sub. C, 1992 U.S.C.C.A.N. (106 Stat.) 2776, 2921 (Oct. 24, 1992), note to 15 U.S.C. § 79.

Utilities, http://www.psc.state.fl.us/mcd/MCD-E.html (visited January 17, 2001). Many of the larger utilities self-generate much of their power. Others rely primarily on wholesale, contractual purchases to meet their needs. Regardless of how it obtains energy, however, every utility has an obligation to meet the demands of its retail customers.

The Florida Public Service Commission ("PSC" or the "Commission") regulates the business activities of the Florida utilities in several respects, including the following:[3]

First, Florida law requires IOUs to sell power to all customers within their service territory at rates approved by the PSC. FLA. STAT. §§ 366.03, 366.04(2)(b), 366.05(1) and 366.06 (2000). Rate approval depends in-part upon the most cost-effective means available of acquiring new generation capacity being employed. *See* FLA. STAT. § 366.041 (2000); FLA. ADMIN. CODE. R. 25-22.082 (2000). For example, an IOU must purchase power to meet its capacity needs whenever it would be more cost-effective than adding new self-generation capacity. *Id.* This requirement is echoed in the Need Provision, pursuant to which no new power plant will be allowed if a more cost-effective alternative, such as a power purchase contract from an independent generator, exists.

Second, in order to ensure that all available alternatives are considered, the PSC requires IOUs to employ competitive bidding, by first widely publishing a request for proposals and then analyzing the responses according to criteria set by the PSC. FLA. ADMIN. CODE. R. 25-22.082 (2000). This procedure must be followed before an IOU can seek certification for a new power plant. *Id.*

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3. Municipal utilities and electric cooperatives are subject to less pervasive oversight than IOUs, but still must comply with the Need Provision.

Third, the PSC engages in long-term planning to ensure that adequate electric power reserves are maintained.[4] To facilitate this, Florida law requires utilities to file ten-year site plans, through which they coordinate their growth with the PSC. FLA. STAT. § 186.801 (2000). The PSC has also routinely addressed matters such as planning studies, electric grid reliability, and alternatives to new construction. *See, e.g., In re: Investigation into the Adequacy of the Elec. Transmission Grid in North Florida*, 90 FPSC 12:519 (1990); *In re: Generic Investigation into Planning and Operating Reserve Practices of Peninsular Florida Generating Electric Utilities*, 94 FPSC 10:203 (1994); *In re: Adoption of Numeric Conservation Goals and Consideration of National Energy Policy Act Standards (Section 111)*, 94 FPSC 10:392 (1994).

Finally, as discussed below, the PSC is charged with ensuring that every large steam power plant built in Florida is both needed and cost-effective. FLA. STAT. § 403.519 (2000). To do this, it must evaluate the power demands of the customers to be served, determine whether there are alternatives to the new construction, such as contractual power purchases or conservation measures, and determine whether the new plant will be reliable and cost-effective for the utilities whose customers rely on it. FLA. STAT. §§ 403.519, 403.507(2)(a)2 (2000).

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4. Florida is one of the fastest growing states in the union. It is also one of the most ecologically sensitive, containing, for example, among the highest number of sensitive wetlands and protected species of wildlife of any state. *See* United States Fish & Wildlife Service, *Southeast Wetlands*, *http://wetlands.fws.gov/Pubs_Reports/Sewet/index.html*, and *Listed Species by State/Territory*, *http://ecos.fws.gov/webpage/usmap.html* (visited January 21, 2001). This combination of factors imposes a unique and complex set of regulatory and planning challenges to accommodate rapid growth while protecting and conserving sensitive environmental resources. The balance drawn in the statutory provisions at issue here is but one example of this.

Utilities are permitted to rely on both self-generated and purchased power to meet their customers' projected energy demand and to maintain reserve generation capacity. However, only committed purchased power may be used in capacity planning. Utilities cannot rely upon generating resources that are not contractually committed to be available when needed, and therefore cannot treat such resources as part of their power supply plans. (T3 417, 444; T4 537-38) For this reason, when utilities rely on purchases to meet customer demand, they typically structure firm contracts for specified generating capacity. (T4 538)

II. THE FLORIDA ELECTRICAL POWER PLANT SITING ACT AND ELECTRICAL ENERGY CONSERVATION ACT

Florida regulates the construction of new steam power plants through two statutes: The Florida Electrical Power Plant Siting Act ("Siting Act"), Florida Statutes Sections 403.501 to 403.518, and the Florida Electrical Energy Conservation Act ("FEECA"), Florida Statutes Sections 366.80 to 366.85 and 403.519. The Need Provision was enacted as part of FEECA but serves as the initial step in the application and certification process under the Siting Act. *See* FLA. STAT. §§ 403.519, 403.507(2)(a)2.

The 1973 Siting Act provided a coordinated environmental review of power plant projects. *See* 1973 FLA. LAWS Ch. 73-33. In recognition of the obvious impact these plants have on the environment, ultimate approval authority for power plants was placed at the highest level of the executive branch of state government: the Florida Governor and Cabinet, who sit as the Electrical Power Plant Siting Board. FLA. STAT. § 403.509 (2000).

The drafters of the Siting Act expressly sought to implement coordinated and disciplined growth of the state's electric system:

> The Legislature finds that the present and predicted growth in electric power demands in this state requires the development of a procedure for the selection and utilization of sites for electrical generating facilities and the identification of a state position with respect to each proposed site.
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> * * *
>
> It is the policy of this state that, while recognizing the pressing need for increased power generation facilities, the state shall ensure through available and reasonable methods that the location and operation of electrical power plants will produce minimal adverse effects on human health, the environment, the ecology of the land and its wildlife, and the ecology of state waters and their aquatic life and will not unduly conflict with the goals established by the applicable local comprehensive plans. It is the intent to seek courses of action that will fully balance the increasing demands for electrical power plant location and operation with the broad interests of the public.

1973 FLA. LAWS Ch. 73-33, at 73; FLA. STAT. § 403.502 (2000). Providing further evidence of its goal of disciplined growth, the Siting Act bill also required electric utilities to file ten-year site plans and coordinate their capacity growth with the PSC. *See* Laws of Florida, Ch. 73-33, at 76. FLA. STAT. § 186.801 (2000).

The legislative history of the Siting Act demonstrates the intent to limit the building of power plants to only those that are absolutely necessary. During the legislative debates, the Chair of the House Committee on Environmental Protection noted that review under the Siting Act would prevent utilities from "going out and building any power plants [they] don't need." (R9 1765-1821) The Act thus required state regulators first to

"make a determination that there is in fact a need that has to be served, and then . . . balance the ecological considerations with that need." *Ibid.*

The Need Provision was enacted in 1980 as part of FEECA, which was designed to address the rapidly expanding demand for power, and granted the PSC authority to require utilities to develop plans and implement programs for energy conservation. *See* 1980 FLA. LAWS Ch. 80-65; FLA. STAT. §§ 366.81 and 366.82. To further its conservation goals and provide specific criteria for evaluating need, FEECA included the Need Provision, which provides:

> On request by an applicant or on its own motion, the [PSC] shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act. . . . The commission shall be the sole forum for the determination of this matter, which accordingly shall not be raised in any other forum or in the review of proceedings in such other forum. In making its determination, the commission shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. The commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant and other matters within its jurisdiction which it deems relevant. The commission's determination of need for an electrical power plant shall create a presumption of public need and necessity and shall serve as the commission's report required by s. 403.507(2)(a)2. An order entered pursuant to this section constitutes final agency action.

FLA. STAT. § 403.519. Prior to 1980, the PSC's role was to submit an advisory report on the need for the proposed plant, which was considered along with other environmental data in the final siting decision. 1973 FLA. LAWS Ch. 73-33, at 77; FLA. STAT. § 403.507(1) (1979). The Need Provision elevated the issue of need for a proposed plant from what was merely one consideration taken into account by the Governor and Cabinet, to an independent threshold determination that controls whether certification may be issued.

The Need Provision protects Florida against having to bear the inevitable environmental impacts from power plants unless those plants are truly necessary. It requires conservation and energy efficiency programs to be used whenever possible in lieu of new generation. It also serves a consumer protection function by requiring the new plant to be the most cost-effective means of supplying the need found to exist.

In applying the Need Provision to wholesale generators, the PSC initially attempted to evaluate need from a statewide perspective, as Petitioner urged below. However, the PSC concluded that this approach was unworkable, because it failed to take into account the fact that the output of the proposed plant would eventually have to be relied upon by a specific utility or utilities to meet the needs of their customers. *See In re: Hearings on Load Forecasts, Generation Expansion Plans and Cogeneration Prices for Peninsular Florida's Electric Utilities*, 89 FPSC 12:294 (1989); *In re: Petition of Nassau Power Corp. to Determine Need for Electrical Power Plant (Okeechobee County Generation Facility)*, 92 FPSC 10:643 (1992), *aff'd, Nassau Power Corp. v. Deason*, 641 So. 2d 396 (Fla. 1994). The PSC therefore interpreted the Need Provision as "utility-specific," meaning that the needs to be evaluated are those of the retail-serving utilities to which the plant is ultimately committed. *Id.* The Supreme Court of Florida has twice reviewed and approved the PSC's decision to require a utility-specific showing. *See Nassau Power Corp. v. Beard*, 601 So. 2d 1175,

1176-77 (Fla. 1992) ("*Nassau I*"); *Nassau Power Corp. v. Deason*, 641 So. 2d 396, 397-99 (Fla. 1994) ("*Nassau II*"). The PSC consistently applied this approach until the present case, where by a three to two margin it allowed the need certification to be issued on the basis of speculative market opportunity rather than a detailed evaluation of the needs of specific utilities and their customers. Consistent with its earlier precedents, the Supreme Court of Florida reversed the PSC and reaffirmed that the need determination must look at the *actual* needs of the utilities to which the plant capacity is contractually committed. *Tampa Elec. Co. v. Garcia*, 767 So. 2d 428, 200 P.U.R. 4th 370 (Fla. 2000).

III. THE FEDERAL REGULATORY STRUCTURE

A. The Federal Power Act ("FPA") and Public Utility Holding Company Act ("PUHCA")

Congress first regulated the provision of electric power in 1935, with the passage of FPA and PUHCA. These statutes decentralized the market for electric power and imposed federal controls over wholesale energy transactions and the structure of utility companies. All other aspects of electric utility regulation were left to the states and their political subdivisions.

PUHCA, 15 U.S.C. § 79, *et seq.*, was aimed at large regional monopolies. It forced electric utilities to segregate themselves into smaller companies. PUHCA did not, however, interfere with local regulation of utilities. Indeed, it enhanced state control of electric utilities by restructuring the industry into local companies more fit for state regulation.

FPA sought to facilitate energy transactions between local utilities. It placed regulatory authority over interstate wholesale power transactions with what is now the Federal Energy Regulatory Commission ("FERC"). 16 U.S.C. § 824(b)(1). Like PUHCA, FPA did not interfere with state regulation of the electric power industry. Significantly, while vesting FERC with

general jurisdiction over wholesale energy transactions, FPA expressly states that FERC "shall not have jurisdiction [except in instances not applicable here] over facilities used for the generation of electric energy." *Id.* FERC has recognized that this provision reserves to the states exclusive jurisdiction over plant siting, licensing and construction. *Monogohela Power Co.*, 40 FERC & 61,256 (September 17, 1987).

B. The Energy Policy Act of 1992 ("EPAct") and FERC Order No. 888

In 1992 Congress sanctioned the creation of a new class of non-utility Independent Power Producers ("IPPs") by enacting EPAct. EPAct created new exemptions from the ownership restrictions of PUHCA, which allowed utility-affiliate companies such as Duke to develop wholesale power projects. EPAct also created new requirements for open access to electric transmission systems.

While EPAct loosened ownership restrictions, nowhere does it purport to limit state regulatory authority over power plant licensing and siting, or exempt IPPs from state licensing requirements. To the contrary, EPAct expressly preserves the authority of states and local governments to regulate the construction of power plants:

> Nothing in this title or in any amendment made by this title shall be construed as affecting or intending to affect, or in any way interfere with, the authority of any State or local government relating to environmental protection or the siting of facilities.

P.L. 102-486 § 731, Title VII, Sub. C, 1992 U.S.C.C.A.N. (106 Stat.) 2776, 2921 (Oct. 24, 1992), note to 15 U.S.C. § 79.

In 1996, after nearly four years of study and deliberation, FERC implemented the EPAct provisions requiring transmission system open access through a watershed order entitled *Promoting Wholesale Competition Through Open Access*

Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21540 (April 24, 1996). In that order FERC recognized the limited effect of EPAct on state regulatory authority, disavowed any intent to interfere with "the traditional tasks of state . . . regulators," noted that states retain regulatory authority over power production facilities, and took specific note of the fact that "Congress left to the states authority to regulate generation and transmission siting." 61 Fed. Reg. at 21625, 21626 and 21626 n.543 (citing FPA §§ 201(b) and 211(d)(1), and EPAct § 731).

IV. THE PROCEEDINGS BELOW

A. The Proceedings Before the PSC

The present controversy began with a Petition for Determination of Need for an Electrical Power Plant filed jointly by the City and Duke in 1998 (the "Siting Petition"). The Siting Petition alleged that Duke, the project developer, would sell approximately 6 percent of the 514 Megawatt ("MW") capacity of its plant to the City according to pre-negotiated terms, but would make no up-front commitments to sell any of the remaining 94 percent to a specific utility. Rather, Duke indicated that it intended to sell the majority of the energy from the plant as market opportunities arose. According to the Siting Petition, these sales were to be made almost exclusively to electric utilities within Florida: "[V]irtually all — more than 99 percent — of all [*sic*] sales from the Project over the 2002-2012 period are expected to be to other utilities in Peninsular Florida. . . ." *Siting Petition*, p. 19, ¶ 28.

At hearing, Duke and Petitioner simply did not present evidence on many of the criteria of the Need Provision. For example, Petitioner offered no evidence evaluating alternatives to constructing a new 514 MW plant, and no proof that it had exhausted all conservation alternatives that would mitigate the need for the plant. (T3 390-91, 450-52)

Duke acknowledged that the PSC could not determine the prices utilities would pay for power, and therefore could not evaluate cost effectiveness to those utilities. (T3 442; T4 635-37) Duke and Petitioner could also not explain how the uncommitted 94 percent of the plant's capacity would improve the reliability of any utility, since no utility could count on the availability of this capacity to meet its customers' demands. (T3 443-44, 505; T4 538, 562-64, 635-37)

Abandoning its long-standing historical practice, the three-commissioner PSC majority found that the Florida statutory scheme allowed a need certification to be granted based solely on the assertion that there exists a speculative market opportunity for the plant's generation. *Tampa Elec.*, 767 So. 2d at 432.

B. The Decision of the Supreme Court of Florida

On appeal, the Supreme Court of Florida reversed the PSC, reaffirming its holdings in *Nassau I* and *Nassau II* that the criteria of the Need Provision are utility specific. A wholesale power provider must, therefore, have a contractual commitment to a retail-serving utility before applying for need certification:

> We conclude that our analysis of the Siting Act, articulated in [*Nassau I* and *Nassau II*] is applicable to the present case. In *Nassau II* we stated:
>
> > The Siting Act was passed by the legislature in 1973 for the purpose of minimizing the adverse impact of power plants on the environment. *See* §§ 403.502, FLA. STAT. (1989). That Act establishes a site certification process that requires the PSC to determine the need for any proposed power plants, including [independent generating plants], based on the criteria set forth in section 403.519, Florida Statutes (1989). Section

> 403.519 requires the PSC to make specific findings for each electric generating facility proposed in Florida, as to (1) electric system reliability and integrity, (2) the need to provide adequate electricity at a reasonable cost; (3) whether the proposed facility is the most cost-effective alternative available for supplying electricity; and (4) conservation measures reasonably available to mitigate the need for the plant.
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> * * *
>
> The Commission [has] reasoned that a need determination proceeding is designed to examine the need resulting from an electric utility's duty to serve customers. Non-utility generators . . . have no similar need because they are not required to serve customers. The Commission's interpretation of section 403.519 also comports with this Court's decision in *Nassau Power Corp. v. Beard*. In that decision, we rejected Nassau's argument that "the Siting Act does not require the PSC to determine need on a utility-specific basis." 601 So. 2d at 1178 n. 9. Rather, we agreed with the Commission that the need to be determined under section 403.519 is "the need of the entity ultimately consuming the power," in this case FPL.' [*Nassau II*]. 641 So. 2d at 397, 398-99 (footnote omitted).

Tampa Elec., 767 So. 2d at 433-34 (quoting *Nassau II*, 641 So. 2d at 387, 398-99).

Applying its longstanding interpretation of the Need Provision, the court found that the required evaluation could not be performed until the project's power output was contractually committed to a retail utility or utilities:[5]

> Th[e] need determination, pursuant to section 403.519, contemplates the PSC's express consideration of the statutory factors based upon demonstrated specified needs of [specific] Florida Customers. The need determination is part of the process that the Legislature intended by its plain language to balance "the pressing need for increased power generation facilities" with the necessity that the state ensure through available and reasonable methods that the location and operation of electrical power plants will produce minimal adverse effects on human health, the environment, the ecology of the land and its wildlife, and the ecology of state waters and their aquatic life. § 403.502, FLA. STAT. (1997).
>
> Accordingly, we find that the statutory scheme embodied in the Sitting Act and FEECA was not intended to authorize the determination of need for a proposed power plant output that is not fully committed to use by Florida customers who purchase electrical power at retail rates.

Tampa Elec., 767 So. 2d at 435.

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5. As construed by the Supreme Court of Florida, the purpose of this contracting requirement is not economic protectionism, but rather "minimizing the adverse impact of power plants on the environment" by allowing only those plants that are truly necessary to be built. *Tampa Elec.*, 767 So. 2d at 433, 435. This evaluation cannot be performed until a commitment to serve the needs of specific utility customers is made, and the terms and conditions under which the power will be committed and sold are known. *Id.* at 435.

Turning to the federal issues raised before this Court, the Florida court held that because Congress expressly reserved to the states jurisdiction over power plant siting, the Florida statutory scheme was constitutionally permissible and not in conflict with federal law. *Id.* at 436. The court therefore found the federal issues raised by Petitioner to be without merit.

SUMMARY OF THE ARGUMENT

Florida has a well-developed statutory process that balances the need of consumers for electrical energy with the need to protect its fragile natural environment. Petitioner did not meet those stringent, but impartial, standards. Its application for a license to build a new power plant was properly denied because it made no showing that the plant was necessary to meet the specific demands of end users. Unable to demonstrate compliance with these rational requirements, Petitioner mischaracterizes and then attacks the Need Provision as an improper protectionist measure.

The Need Provision applies uniformly to *any* entity intending to build a power plant in Florida. It requires a detailed review by state regulators to determine whether a proposed plant is truly necessary, and whether it will be a reliable and cost-effective source of power for the customers that rely on it. This requirement does nor prevent anyone from building a power plant in Florida; it merely requires the details of how, to whom, and under what terms the power from a project will be sold to be known before a certification application can be reviewed by state regulators.

Read as a whole, the Florida statutory scheme demonstrates a clear intent to further legitimate environmental protection and conservation goals. This is confirmed by the history of the Need Provision, which reflects the Florida legislature's determination that, because of their inevitable environmental effects, construction of large power plants in the state should not be allowed unless a proposed plant is needed to meet a proven

retail demand that cannot be mitigated through conservation measures. The Supreme Court of Florida has determined that the only way to accomplish the evaluation required under Florida law is to evaluate the need for power of the retail utilities (*i.e.*, those that directly serve end-users) to which a wholesale-only plant is contractually committed.

The Need Provision does not conflict with the federal laws cited by Petitioner. Congress never intended to foreclose or limit state regulation over power plants, and has expressly indicated that the very statutes cited by Petitioner are not to be construed as limiting state authority over this area. Moreover, FERC, the agency with primary responsibility for implementing federal energy policy, has repeatedly noted the limited impact of federal energy law on state regulatory powers, and has specifically found that "Congress left to the states authority to regulate generation and transmission siting." 61 Fed. Reg. 21540, 21626 n.543 (April 24, 1996). At every turn, Congress and FERC have acted contrary to the Petitioner's preemption theory and sought to preserve, rather than restrict, state powers. Thus, Congress cannot be said to have preempted the state regulation, or to have adopted a policy that is contrary to it.

Because Congress expressly reserved state authority over power plant licensing and related environmental concerns, no Commerce Clause issue is presented. The dormant aspects of the Commerce Clause restrict state powers only when there is no controlling federal legislation. However, even if the commerce clause applied, the Need Provision would pass constitutional muster. It is a non-discriminatory measure that reasonably furthers legitimate environmental goals and has at most a minor and incidental effect on interstate commerce.

The arguments raised by Petitioner are thus without merit and do not warrant review by this Court. Moreover, this Court has previously noted that questions regarding the extent to which public utilities should be regulated are best resolved by the political branches, rather than through constitutional litigation.

The Court has, for this reason, refused to grant relief to Petitioners who made far more compelling constitutional arguments in cases involving utility regulation. *See, e.g., General Motors Corp. v. Tracy*, 519 U.S. 278, 307 (1997). The principle of judicial restraint espoused in *General Motors* has particular applicability in the present case because the Florida Governor and legislature will over the next year evaluate whether to pursue restructuring of the electric industry in the state. Given Congress' clear intent to have these issues resolved by the states, this Court should deny the Petition and allow the state political process to play out free from judicial intervention.

REASONS FOR DENYING THE WRIT

I. THE NEED PROVISION OPERATES WITHIN AN AREA EXPRESSLY RESERVED TO THE STATES BY CONGRESS

State regulations can be superceded by federal law in three ways. *First*, Congress can expressly preempt an area of regulation, prohibiting the states from exercising any authority over the subject matter. *Pacific Gas & Elec. v. State Energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190, 204 (1983) ("*PG&E*"). *Second*, under the doctrine of implied preemption, a federal regulatory program can be so pervasive that an intent to preclude state laws on the same subject will be inferred. *Id. Finally*, a state law can conflict with a federal law such that "compliance with both federal and state regulations is a physical impossibility," or the state law "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Id.* None of these principles applies here.

Over the past 65 years of electric utility regulation, Congress has consistently preserved traditional state authority over power plant licensing and environmental protection. *See supra*, pp. 9-11. Congress has the power to subsume the field of electric utility regulation. But it made a conscious decision not to do so, and has instead left most aspects of utility regulation to the

states. *Id.* Thus, Congress cannot be said to have expressly preempted state regulation of power plants, nor, by its limited enactments in the area, to have fully occupied the field of utility regulation such that a preemptive intent can be inferred.

The Petition identifies no federal provision that conflicts with the Need Provision. Given the express reservation of state jurisdiction over power plant siting and environmental protection, and the lack of any federal provision that conflicts with the Florida statute, Petitioner is left to argue that the Need Provision is contrary to the "goals and policies of federal law."[6] *Petition* at 13-18. As support, the Petition relies heavily on FERC Order No. 888 and a discussion of the history of EPAct to argue that there is a national policy in favor of wholesale electric competition. *Id.* But the Petitioner conveniently ignores the fact that in the midst of their limited provisions promoting wholesale competition, both the FERC order and EPAct clearly and unequivocally reserve to the states authority over power plant licensing and siting and environmental protection. Section 731 of EPAct provides that it shall not "be construed as affecting or intending to affect, or in any way interfere with, the authority of any State or local government relating to environmental protection or siting of facilities."[7] And FERC Order No. 888 observes that "Congress left to the States authority to regulate generation and transmission siting. *See* FPA section 201(b) and 211(d)(1); Section 731 of the Energy Policy Act." 61 Fed. Reg. at 21625-26. Congress obviously has no goal or policy of interfering with state environmental and power plant licensing regulation.

Acting within the area reserved to the states by Congress, the Need Provision imposes reasonable conditions on new power

6. This resort to vague "policies" that have no cited basis in statutory language, underscores the fact that the Need Provision does not conflict with the express terms of any federal law.

7. P.L. 102-486 § 731 Title VII, Sub. C, 1992 U.S.C.C.A.N. (106 Stat.) 2776, 2921 (Oct. 24, 1992), note to 15 U.S.C. § 79.

plant construction. It in no way precludes the development of independent power plants, so long as the developers of those plants make specific commitments for sale of their power, and prove that the plant is necessary to meet the buyers' needs. As discussed above (*supra*, pp. 5-8) this requirement was imposed to serve the reasonable environmental goal of limiting the development of large power plants to only those plants that are truly necessary. The Need Provision was not passed to interfere with the goals or policies of EPAct and has, at most, an incidental effect on those goals and policies.

A limited and incidental effect of a state law upon a generic federal goal or policy is not enough to support a finding of preemption. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1984) (rejecting argument that coal severance tax was preempted because it frustrated national energy policy). This principle is firmly established in *Commonwealth Edison* and in the case relied upon in the Petition for its "goals and policies" argument: *Pacific Gas & Elec. v. State Energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190 (1983) ("*PG&E*").

In *PG&E* this Court reviewed a California statute regulating the construction of nuclear power plants that was challenged as preempted by the Atomic Energy Act, 42 U.S.C. § 2011, *et seq.*, and national energy policy. The statute at issue constituted an absolute moratorium on nuclear power plant development, until such time as state regulators determined that adequate permanent storage facilities had been established by federal agencies for spent nuclear fuel. *PG&E*, 461 U.S. at 194, 198.

The Court found that states have traditionally regulated all aspects of electricity production, and that Congress intended that "the federal government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the States nonetheless retain their traditional responsibility in the field of regulating electric utilities

for determining questions of need, reliability, cost and other related state concerns." *Id.* at 191, 205-06. In enacting the moratorium, California regulators were primarily concerned with the impacts of the lack of adequate waste disposal facilities on the long term economic viability of nuclear plants. Thus, while the California licensing statute was related to the availability of long-term radioactive waste disposal — an area of exclusive federal responsibility — it was found by the Court to have been enacted for the permissible purpose of assuring that new plants will remain economically viable. *Id.* at 223. Accordingly, the statute was upheld, notwithstanding the fact that it would have the incidental effect of impeding the general federal goal of fostering the use of nuclear power. *Id.* ("Given this statutory scheme, it is for Congress to rethink the division of regulatory authority in light of its possible exercise by the states to undercut a federal objective. The courts should not assume the role which our system assigns to Congress").

The parallels are obvious. In the case at hand, Congress has acted merely to remove the federal restrictions that limited the creation of IPPs and to facilitate open access to electric transmission lines. As in *PG&E*, Congress did not purport to divest states of their traditional authority over the need for new plants, nor did it direct states to unconditionally approve plants proposed by the new class of IPPs. To the contrary, the federal statutes cited in the Petition reserve state authority over plant licensing and environmental regulation. A review of the history and purpose of the Need Provision inescapably leads to the conclusion that it was enacted for the very purposes carved out for state regulation by Congress. There is no cause to strike the statute based on its incidental effects on national goals and policies.

II. NO DORMANT COMMERCE CLAUSE ISSUE IS IMPLICATED BECAUSE CONGRESS RESERVED POWER OVER POWER PLANT SITING TO THE STATES

In Article I, Section 8 of the United States Constitution, Congress is granted the power to "regulate Commerce . . . among the several states." This Court has held that "[t]he negative or dormant implication of the Commerce Clause prohibits state taxation . . . or regulation . . . that discriminates against or unduly burdens interstate commerce and thereby 'impede[s] free private trade in the national marketplace.' " *General Motors Corp. v. Tracy,* 519 U.S. 278, 300 (1997) (*quoting Reeves, Inc. v. Stake* 447 U.S. 429 (1980)). The Court has made clear, however, that dormant Commerce Clause considerations are overridden where Congress has expressly authorized the type of state regulation at issue.[8] The Petition itself acknowledges this central principle: "[A]ny state regulation of interstate commerce is subject to scrutiny under the dormant Commerce Clause, **unless such regulation has been preempted or expressly authorized by Congress.**" *Petition,* at 20 (citing *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County,* 48 F.3d 701 (3d Cir. 1995)) (emphasis added).

As discussed above, in EPAct Congress expressly reserved power over licensing, siting and environmental regulation of power plants to the states. Accordingly, the operation of state laws such as the Siting Act was expressly envisioned by Congress and cannot be said to be a violation of the dormant Commerce Clause. Congress must have contemplated that this exercise of state authority would have an incidental effect on the implementation of EPAct. *See Northwest Central,* 489 U.S. at 524. (Congress should be presumed to have known

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8. *See Northwest Cen. Pipeline Corp. v. Corporation Comm'n of Kansas,* 489 U.S. 493 (1988); *Lewis v. B.T. Investment Managers, Inc.,* 447 U.S. 27 (1980); *Prudential Ins. Co. v. Benjamin,* 328 U.S. 408 (1946).

that its reservation of state regulatory authority would result in state programs that impact interstate commerce). It nevertheless chose expressly to preserve state power over these matters. If Congress meant to exempt IPPs from state siting authority, it would have done so. The fact that the opposite course was chosen negates any claim under the dormant commerce clause. *See Northwest Central*, 489 U.S. at 524 (there is little point to a reservation of power to the states "if the inevitable repercussions of States' exercise of this power in the arena of interstate commerce meant that a State could not constitutionally" act).

III. THE NEED PROVISION IS A PERMISSIBLE REGULATION UNDER TRADITIONAL COMMERCE CLAUSE ANALYSIS

Even if Congress had not reserved to the states their traditional authority to regulate power plant licensing and siting, the Need Provision would easily pass muster under traditional commerce clause analysis for the reasons that follow.

A. The Need Provision is Non-Discriminatory, Does Not Bar Market Access and is Reasonable.

1. The Need Provision Does Not Discriminate in Favor of Domestic Corporations

Like the rest of Florida's environmental and utility regulatory statutes, the Need Provision, on its face, applies to *every* entity wishing to construct a large new steam power plant in Florida. Its restrictions are imposed on all power plant developers, foreign and domestic. Likewise, the requirement of a commitment to specific retail customers must be met regardless of who applies. An in-state developer could not have secured need certification based on a mere speculative market opportunity any more than Duke could. It is the lack of a contractual commitment to meet specific demand, and not the citizenship of the applicant, that determines this result. Indeed, because of the absence of such a commitment, the Petition failed

to address many of the express requirements of the Need Provision, including proof of the demand for power of specific customers, proof that there was no adequate conservation alternative, and, proof that the power would be cost-effective and reliably available to the purchasers. *See supra*, pp. 11-12.

2. The Need Provision Does Not Bar Access to Florida's Markets

While the Need Provision places conditions on the construction of new power plants in Florida, it in no way forecloses access to Florida's electric market. There is no prohibition on IPPs building plants within the state. All that Florida law requires is that arrangements for the sale of power be made *before* certification is sought, so that the PSC can fulfill its statutory duty to evaluate the need for and cost-effectiveness of project from the perspective of the customers to be served.

Duke never even attempted to obtain firm contracts for the uncommitted 94 percent of its proposed plant's capacity. Yet, it had ample opportunity to do so. Because they have a duty to minimize cost, utilities *must* enter into such contracts when they are the most cost-effective means of securing needed generation capacity. Indeed, pursuant to the very statute challenged here, the PSC would be required to reject any application for new power plant construction by a utility that had a less costly power purchase option available to it.

The Petition is rife with suggestions that, unless this Court strikes down the Need Provision, power plants such as the one proposed by Duke and Petitioner cannot be built in Florida. This is simply wrong. As discussed above, the Florida and federal regulatory schemes ensure that IPPs have every opportunity to sell their project's capacity to Florida retail utilities and cooperatives. The Need Provision merely requires that IPPs enter into arrangements for power sales, and prove that the project is needed by the purchasing utilities, before embarking on new construction. Duke's decision to reserve the

bulk of its plant's output for later sale is inconsistent with the entire purpose of the Need Provision, as it precluded state regulators from conducting a meaningful inquiry into the question of whether the proposed plant was truly necessary.

3. *The Need Provision Is a Reasonable Regulatory Measure*

Requiring a showing of need for a new power plant is not a novel concept. Many other states recognize, as Florida has, that large power plants have inevitable and far reaching environmental effects that can scar the landscape and harm environmental resources long after the plant ceases to be operate. Each state's limited resources can support only so many power plants. For this reason, states often impose some form of need review prior to allowing a new power plant to be built.[9]

By regulating the building of electric power plants as it has, Florida has protected its environment and also avoided the sort of uncontrolled market disruptions that have recently bedeviled California.[10] The requirement of a commitment to serve specific retail demand has helped ensure both that

9. *See, e.g.*, Ill. COMP. STAT. ANN. ch. 220, para. 5/8-406 (2000); N.C. GEN. STAT. § 62-110.1 (Michie 2000); MISS. CODE ANN. §§ 77-3-11 and 77-3-14 (2000); KY. REV. STAT. ANN. §§ 278.020 and 278.025 (Michie 1998); COLO. REV. STAT. §§ 40-5-101 and 40-5-102 (2000); MINN. STAT. §§ 116C.53 and 216B.243 (2000).

10. *See* Berthelsen, *Genesis Of State's Energy Fiasco: String of bad decisions on deregulation could end up costing consumers $40 billion*, San Francisco Chronicle (Dec. 31, 2000), *http://www.sfgate.com/cgi-bin/ article.cgi?f'/chronicle/archive/2000/12/31/MN167927.DTL*; Purdom, *California's Power Crisis Replays Familiar Theme*, New York Times, (Jan. 25, 2001), *http://www.nytimes.com/2001/01/25/national/25CALI.html;* Oppel, *Independent Firms a Growing Factor in Latest Energy Crisis*, New York Times (Jan. 23, 2001), *http://www.nytimes.com/2001/01/23/business/23UTIL.html*; Berthelsen and Winokur, *State Probing Power Companies Scheme?*, San Francisco Chronicle (Jan. 14, 2001), *http://www.sfgate.com/cgi-bin/article.cgi?file'chronicle/archive/2001/01/14/MN115295.DTL*

unneeded plants are not built and that Florida utility customers are not left empty-handed by the independent producers whose generation capacity was expected to be available but who have made no contractual commitment to supply their needs.

B. The Incidental Effect on Interstate Commerce is Far Outweighed by the Public Benefits of the Need Provision.

This Court has recently noted that the Commerce Clause was never intended to prevent the states from legislating to protect public welfare. *General Motors*, 519 U.S. at 306. Thus, where a statute regulates evenhandedly to effectuate a legitimate state interest and has only incidental effects on interstate commerce, it will be upheld so long as the burden on commerce does not clearly exceed the local benefits. *Id.*; *see also Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

As demonstrated above, the Need Provision is an environmental measure that protects the state against the harmful effects of unneeded power plants. Requiring a determination of need for each new power plant has been found by the Florida legislature to strike a reasonable balance between the need for new generation capacity and the need to protect Florida's sensitive environment. *See* FLA. STAT. §§ 403.501, 403.502(2).

This Court has long recognized the great public importance of state regulations that protect the environment and natural resources. *See, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981); *Northwest Central*, 489 U.S. at 518-19, 522. It has also recognized that it is impossible to impose environmental restrictions without having an incidental effect on commerce. *See Clover Leaf*, 449 U.S. at 473-74. Likewise, the Court has found regulation of utilities for the purpose of consumer protection to be a legitimate state regulatory goal. *See General Motors*, 519 U.S. at 304-306; *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 394 (1983).

The Need Provision serves these permissible goals in a reasonable manner, and has, at most, only an incidental impact on interstate commerce. It does not preclude anyone from participating in the Florida electric market, and merely sets reasonable conditions on new power plant construction. The paramount state interests served by the state regulatory scheme — protection of the environment and consumer interests from the impacts of unneeded power plants — far outweigh its incidental effects on commerce. It therefore easily passes the balancing test set forth in *General Motors* and *Pike*.

The principal case cited by the Petitioner on this point, *Buck v. Kuykendall*, 267 U.S. 307 (1925), is unavailing, and actually highlights the fact that the Need Provision permissibly serves a legitimate state interest. In that case, the Court was presented with a commerce clause challenge to a Washington statute that required a license for the operation of an interstate transportation service over state highways. *Id.* at 325. Writing for the majority, Justice Brandeis noted that Washington allowed all persons to use its highways for noncommercial purposes, but imposed special restrictions that effectively granted monopolies on interstate transportation to certain commercial carriers. The Court drew a distinction between legitimate and rational resource conservation measures and those designed solely to impede commerce. In the words of Justice Brandeis the Washington requirement violated the dormant Commerce Clause because it was "not regulation with a view to safety or to conservation of the highways, but the prohibition of competition." *Id.* at 315-16.

The Need Provision clearly falls on the permissible side of Justice Brandeis' dichotomy. It was not enacted to discriminate among users of state resources. It is, instead, the equivalent of a law enacted for "conservation of the highways," as it protects the state's limited natural resources and sensitive environment from the adverse effects of unnecessary electric power plants. Moreover, unlike the Washington statute, the Need Provision

does not discriminate against certain developers. *Anyone* wishing to build a large new power plant in Florida must prove that it will serve a specific and proven retail need. The statute regulates rationally and evenhandedly and would clearly be upheld under the reasoning of *Buck*.

CONCLUSION

The arguments raised by Petitioner do not warrant review in this Court. It is worth noting that Florida is currently considering revisions to the laws regulating electric utilities, including the Need Provision. This effort was initiated by the Governor, who convened a special commission, the Florida Energy 2020 Study Commission, to advise the state on whether to restructure its electric regulatory system. The commission's recommendations are to be presented to the state legislature for debate and consideration later this year. As this Court noted in *General Motors*, the question of how best to regulate a market for a public utility, taking into account the strong public need for reliable, uninterrupted and economical service, is best resolved by the political branches, which have the institutional competence and broad powers necessary to undertake such measures. 519 U.S. at 307. Given that Congress has left these matters to the states, and that the state in question is studying the issues involved, the Court should refuse the Petitioner's invitation for judicial intervention.

Respectfully submitted,

MATTHEW M. CHILDS, P.A.
CHARLES A. GUYTON
STEEL HECTOR & DAVIS LLP
215 South Monroe Street
Suite 601
Tallahassee, Florida 32301
(850) 222-2300

ALVIN B. DAVIS, P.A.
Counsel of Record
JOHN T. BUTLER, P.A.
GABRIEL E. NIETO
STEEL HECTOR & DAVIS LLP
200 South Biscayne Boulevard
Suite 4000
Miami, Florida 33131
(305) 577-7000

Attorneys for Respondent
Florida Power & Light Company

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No. 00-1052

IN THE

Supreme Court of the United States

UTILITIES COMMISSION,
CITY OF NEW SMYRNA BEACH, FLORIDA,

Petitioner,

v.

TAMPA ELECTRIC COMPANY, FLORIDA POWER & LIGHT COMPANY, and FLORIDA POWER CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

BRIEF IN OPPOSITION FOR RESPONDENT TAMPA ELECTRIC COMPANY

SHEILA MCDEVITT*
Vice-President and General Counsel
HARRY W. LONG, JR.
Assistant General Counsel
TAMPA ELECTRIC COMPANY
Attorneys for Respondent Tampa Electric Company
Post Office Box 111
Tampa, FL 33601-0111
(813) 228-1804

* *Counsel of Record*

164921

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Respondent, Tampa Electric Company, is a wholly-owned subsidiary of TECO Energy Inc. which is publicly traded.

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REASONS FOR DENYING THE WRIT

The Utilities Commission, City of New Smyrna Beach, Florida ("New Smyrna" or "Petitioner") has urged this Court to review and, ultimately, reverse the decision of the Florida Supreme Court in the case of *Tampa Electric Co., et al. v. Joe Garcia, et al.*, 767 So. 2d 428 (Fla. 2000). The gravamen of New Smyrna's Petition For Certiorari (the "Petition") is that the Florida Electrical Power Plant Siting Act[1] ("Siting Act") and the Florida Energy Efficiency and Conservation Act ("FEECA")[2], as interpreted by the Florida Supreme Court in *Garcia*, supra., are unconstitutional under the Commerce Clause of the United States Constitution. As discussed below, New Smyrna has failed to identify in its Petition a single federal statute or regulation that expressly preempts the State of Florida's exercise of authority under the Siting Act or FEECA. In fact, Congress, expressly and unambiguously manifested its intent in the Energy Policy Act 1992[3] ("Energy Policy Act"), to leave the jobs of siting power plants and managing associated environmental protection issues to the states, *without federal interference.*

New Smyrna's response to the obvious lack of Congressional preemptive intent evidenced in the Energy Policy Act is to argue, in the alternative, that the Siting Act is unconstitutional under the dormant or negative Commerce Clause doctrine. This argument is based on the erroneous

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1. Ch. 73-33, § 1 at 73, Laws of Fla.; §§ 403.501 – 403.518, Fla. Stat.

2. Ch. 80-65, § 5; §§ 366.80 – 366.85 and 403.519, Fla. Stat.

3. Pub. L. 102-486, 106 Stat. 2776 (1992)

assertion that FEECA and the Siting Act are simply exercises in economic protectionism by the State of Florida that are intended to discriminate against out-of-state independent power producers who wish to construct and operate electric generation in Florida. However, the plain language of the Siting Act and the manner in which it has been implemented by the State belie New Smyrna's characterization of that alleged purpose. In addition, neither FEECA nor the Siting Act have any discriminatory impact on interstate commerce that is cognizable under the dormant commerce clause doctrine. *See Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983); *see also General Motors Corp. v. Tracy*, 519 U.S. 278 (1997).

Finally, as is the case in many other states, Florida is currently engaged in a comprehensive review of its electric industry structure. Shortly after the Florida Supreme Court issued its decision in *Garcia,* the Governor of Florida issued an Executive Order[4] establishing the Florida Energy 2020 Study Commission ("2020 Commission") whose charter is to assess Florida's energy needs over the next 20 years. Based on this assessment, the 2020 Commission will propose changes in the current energy regulatory framework to the Florida Legislature that will optimize the state's ability to meet its future energy needs. While it may be appropriate, as a matter of legislative policy, to consider how merchant power plants might play a useful role in a competitive environment where the market design and applicable regulations create a "level playing field" for all market participants, the current regulatory structure does not define

4. State of Florida, Office of the Governor, Executive Order No. 00-127, May 3, 2000.

a role for such plants. The Company has shared with the 2020 Commission its views on how merchant plants might be integrated into a new state electric regulatory structure. However, Tampa Electric respectfully submits that the nature and scope of changes in the existing law in Florida with regard to the siting of power plants and the electric regulatory structure in general, are matters to be addressed by the Florida Legislature in an exercise of the police powers traditionally reserved to the states. Given the fluid nature of the current regulatory debate in Florida, the Court's review of the issues raised in the Petition would be premature and perhaps unnecessary.

STATEMENT OF THE CASE

There is no need to guess at the legislative intent behind the Siting Act[5]. Section 403.502(2), Fla. Stat., specifies, in

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5. *See* § 403.502 Legislative Intent – The Legislature finds that the present and predicted growth in electric power demands in this state requires the development of a procedure for the selection and utilization of sites for electrical generating facilities and the identification of a state position with respect to each proposed site. The Legislature recognizes that the selection of sites and the routing of associated transmission lines will have a significant impact upon the welfare of the population, the location and growth of industry, and the use of the natural resources of the State. The Legislature finds that the efficiency of the permit application and review process at both the state and local level would be improved with the implementation of a process whereby a permit application would be centrally coordinated and all permit decisions could be reviewed on the basis of standards and recommendations of the deciding agencies. It is the policy of this state that, while recognizing the pressing need for increased power generation facilities, the state shall insure through available and reasonable methods that the location and operation of electrical power plants will produce minimal adverse affects on human health,, the environment, the ecology of the land and its wildlife, and the ecology of state waters and their (Cont'd)

relevant part, that the Siting Act is intended "to effect a reasonable balance between the need for the facility and the environmental impact resulting from construction and operation of the facility . . .". Recognizing that the construction of any power plant is likely to have environmental consequences, the Siting Act is intended to ensure that such consequences are not imposed on the state unless there is a sufficient need for a proposed power plant. This explicit balancing of need for new generation against the environmental consequences of siting a new power plant is the essence of the Siting Act process.

The FEECA/Siting Act process is clear and straightforward. Any construction of new, non-exempt[6] electrical power plants[7] or any expansion of the steam

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(Cont'd)
aquatic life and will not unduly conflict with the goals established by the applicable local comprehensive plans. It is the intent to seek courses of action that will fully balance the increasing demands for electrical power plant location and operation with the broad interests of the public. . . .

6. Under § 403.506, Fla. Stat., electrical power plants or steam generating plants of less than 75 megawatts in capacity are exempt from the certification requirements of the Siting Act.

7. An "electrical power plant" is further defined in § 403.503(12), Fla. Stat., for the purpose of certification as:

> . . . any steam or solar electrical generating facility using any process or fuel, including nuclear materials, and includes associated facilities which directly support the construction and operation of the electrical power plant and those associated transmission lines which connect

(Cont'd)

capacity of existing electrical power plants requires prior certification under the Siting Act[8]. Under settled Florida law[9], as reiterated by the Florida Supreme Court in *Garcia, supra*, only electric utilities[10], such as Tampa Electric and New Smyrna, who, by definition, have a public utility obligation to serve retail electric customers in Florida, can qualify as applicants under FEECA and the Siting Act. Other generators, who have no obligation to serve retail customers in Florida but may have an interest in producing and selling power for the wholesale electric market, are not precluded from doing so under state law. Such wholesale generators are free to construct and operate plants that are exempt under the Siting Act. In the alternative, wholesale generators can participate in the FEECA and Siting Act process as co-applicants with Florida retail utilities simply by committing the output of their proposed plant to serve the specified need of one or more Florida retail utilities. The FEECA/Siting

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> the electrical power plant to an existing transmission network or rights-of-way to which the applicant intends to connect, *except that this term does not include any steam or solar electrical generating facility of less than 75 megawatts in capacity unless the applicant for such a facility elects to apply for certification under this act* . . . (emphasis added)

8. *See* § 403.506, Fla. Stat.

9. *See Nassau Power Corp. v. Beard*, 601 So. 2d 1175 (Fla. 1992); *In re: Petition of Nassau Power Corp.*, PUC Lexis 1557, Order No. PSC-92-1210-FOF-EQ (PSC Oct. 26, 1992); *Nassau Power Corp. v. Deason*, 641 So. 2d 396 (Fla. 1994)

10. *See* § 403.503(13), Fla. Stat.

Act process is non-discriminatory in that it bars retail utilities and wholesale generators alike from obtaining certification for non-exempt generation facilities unless the output of the proposed facility is tied to a specific, substantiated retail need for electric power.

The Florida Public Service Commission ("FPSC") has the responsibility under FEECA[11] and the Siting Act[12] to determine whether: (1) the proposed generation is needed by an electric utility to meet its obligation to serve retail customers; (2) whether the proposed project will satisfy the identified need; and (3) whether the proposed project is the most cost-effective means of meeting the identified need. The FPSC is also required, in making its recommendation, to consider the "conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant . . ."[13]. The FPSC's findings, along with the other environmental and project information adduced during the process, are delivered to the Governor and Cabinet who must strike the final balance between the need for the proposed facility and the environmental impact associated with the construction and operation of the facility.

It is important to understand that the FEECA/Siting Act process does not exist in a vacuum. To the contrary, these elements of the Florida Statutes are part of a comprehensive

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11. § 403.519, Fla. Stat.

12. § 403.508(3), Fla. Stat.

13. § 403.519, Fla. Stat

state regulatory framework that has been designed to ensure reliable, cost-effective and environmentally responsible electric service. As part of its obligation to serve, Tampa Electric, like other utilities serving retail customers in Florida, must anticipate customer demand for electric energy and plan, well in advance, to meet that anticipated demand either through increased conservation, new generation or firm long-term power purchase agreements with other generators[14]. Investor-owned utilities, such as Tampa Electric, who propose to meet anticipated customer demand through the construction of new generation, must evaluate alternatives to its proposed power plant by issuing a Request For Proposals[15] ("RFP") *prior to applying for certification under the FEECA/Siting Act process*[16]. The RFP process is open and non-discriminatory. Any in-state or out-of-state generator has the opportunity to respond to the RFP and propose a more economic supply alternative, from either existing or proposed generation. The utility issuing the RFP must accept the most cost effective RFP response unless it can demonstrate that its proposed generation is, in fact, the most cost effective means of meeting anticipated retail customer demand.

It is against this regulatory backdrop that New Smyrna and Duke Energy New Smyrna Beach Power Co., Ltd.

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14. *See* § 366.03, Fla. Stat.

15. *See* Rule 25-22.082(1)(b), F.A.C., where an RFP is defined as *a document in which the investor-owned utility publishes the price and non-price attributes of its next planned generating unit in order to solicit and screen, for subsequent contract negotiations, competitive proposals for the utility's next planned generating unit.*

16. *See* Rule 25-22.082(2), F.A.C.

("Duke") filed a joint petition with the FPSC in August of 1998, for a determination of need for the New Smyrna Beach Power Project, a proposed natural gas fired combined cycle generating plant with 514 megawatts of capacity to be built, owned and operated by Duke at a site in Volusia County, Florida. Duke is an affiliate of Duke Power Company, a North Carolina-based investor owned electric utility. As an Exempt Wholesale Generator ("EWG") subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC"), Duke is not subject to the jurisdiction of the FPSC and has no public utility obligation to serve retail customers in Florida. Of the 514 megawatts of capacity represented by Duke's proposed plant, only 30 megawatts were committed to be sold to New Smyrna to serve its retail load. The balance of the proposed plant capacity was to remain uncommitted and available for sale on the wholesale power market.

In concluding that the FPSC had acted beyond the scope of authority granted to it by the Florida Legislature in finding Duke to be a qualified applicant under the Siting Act, the Florida Supreme Court held in *Garcia* that the "*statutory scheme embodied in the Siting Act and FEECA was not intended to authorize the determination of need for a proposed power plant output that is not fully committed to use by Florida customers who purchase electrical power at retail rates.*"[17] The Court

17. As noted above, the Florida Supreme Court's ruling on this point was simply a reiteration of its holdings in the Nassau cases, supra. In Florida, as in most other states, it is established law that in reenacting a statute, the Legislature is presumed to be aware of the constructions placed upon it by the highest court of the state, and, in the absence of clear expressions to the contrary, is presumed to have adopted these constructions. *Delaney v. State*, 190 So. 2d 578, 581-82 (Fla. 1966). The Florida Legislature re-enacted FEECA and the Siting Act subsequent to the State Supreme Court's interpretation of those statutes, without any relevant change.

went on to note that "*the Legislature must enact express statutory criteria if it intends such authority for the [F]PSC. Pursuant only to such legislative action will the [F]PSC be authorized to consider the advent of the competitive market in wholesale power promoted by recent federal initiatives. Such statutory criteria are necessary if the Florida regulatory procedures are intended to cover this evolution in the electric power industry.*"[18]

ARGUMENT

I.

Congress Has Explicitly Left To The States Precisely The Authority Exercised By The State Of Florida Under FEECA And The Siting Act

New Smyrna broadly asserts in its Petition that FEECA and the Siting Act *conflict* with the federal policy inherent in the Energy Policy Act and FERC Order No. 888 to promote competition in the wholesale generation market. However, New Smyrna fails to identify in its Petition any federal statute or regulation that explicitly preempts Florida's exercise of authority with regard to the environmental regulation, need certification and siting of new electric generating plants. As this Court has frequently indicated, preemption of state law by federal statute or regulation is not favored in the

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18. The Court noted that in this regard, its decision in *Garcia* was consistent with the conclusion of the North Carolina Utilities Commission, which dismissed a similar petition by an independent power producer that proposed a merchant plant in North Carolina that was opposed by Duke Power Company. The North Carolina Commission's opinion was affirmed on appeal. *Empire Power Co. v. Duke Power Co.*, 112 N.C. App. 643, 437 S.E. 2d 540 (Ct. App. 1993).

absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained. *Chicago & Northwestern Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981). It is necessary to look beyond general expressions of "national policy" to specific federal statutes with which the state law is claimed to conflict. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978).

New Smyrna's assertions fail to meet even the threshold test for establishing preemption. There is no conflict between federal law and the State's exercise of authority under FEECA and the Siting Act. The Energy Policy Act explicitly reserves to the states the authority to regulate matters that New Symrna urges this Court to conclude are reserved exclusively to the federal government. Section 731 of the Energy Policy Act provides that:

> Nothing in this title or in any amendment made by this title shall be construed as affecting or intending to affect, or *in any way to interfere with*, the authority of any state or local government relating to environmental protection or the siting of facilities.[19]

(Emphasis added).

The Petitioner's only attempt to rebut this obviously controlling and conclusive statement of Congressional intent is the suggestion that the need certification process under FEECA is "not part of the balancing of environmental

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19. P.L. 102-486 § 731, Title VII, Sub. C, 1992 U.S.C.C.A.N. (106 Stat.) 2776 (Oct. 24, 1992)

impact" addressed in section 731. However, as discussed above, the statement of Legislative intent underlying the Siting Act leaves no doubt that the evaluation of need is inextricably linked with the environmental evaluation of proposed power plant projects for which certification is sought under the Siting Act. The balancing of need for new generation to serve retail electric customers against the environmental consequences of siting such new generation lies at the heart of the FEECA/Siting Act process. One element of the equation would be meaningless without the other, given the stated purpose of these Florida statutes.

New Smyrna's assertions with regard to the significance of FERC Order No. 888 are equally unfounded. While one of the purposes underlying Order No. 888 is the promotion of increased competition in the wholesale generation market, the Order deals only with the issue of open access to electric transmission facilities. Furthermore, FERC has acknowledged that it has no jurisdiction with regard to capacity planning, determination of power needs, plant siting, licensing, construction or operations in light of Congress's specific reservation of authority over such matters to the States. *Monongahela Power Company, Docket No. ER-87-330-001*, 40 F.E.R.C. ¶61 (Sept. 17, 1987). Tampa Electric respectfully suggests that review by this Court is unwarranted and unnecessary in light of Congress's explicitly and unambiguously stated intention to leave to the states the authority to regulate the matters addressed under FEECA and the Siting Act.

II.

There Is No Scheme Of Federal Regulation With Regard To The Siting, Need Certification And Environmental Regulation Of Electrical Power Plants So Pervasive As To Make Reasonable The Inference That Congress Has Implicitly Preempted State Attempts To Regulate Such Matters

As an alternative to its fatally flawed assertion of explicit preemption, New Smyrna argues that FEECA and the Siting Act are preempted under a dormant Commerce Clause theory since those state statutes allegedly frustrate the Congressional intent underlying the Energy Policy Act and create a discriminatory burden on interstate commerce. However, this alternative theory is also untenable. In the absence of express preemptive language, Congress's intent to preempt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). No such conclusion can be reached in this case.

Where the field that Congress is said to have preempted has been traditionally occupied by the states this Court has started with the assumption that the historic police powers of the States were not to be superseded by the Federal act unless that was the clear and manifest purpose of Congress. *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985). *Cf. Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (deference to state regulation of safety under dormant

commerce clause); *Huron Portland Cement Company V. City of Detroit, Michigan*, 362 U.S. 440 (1960) (City smoke abatement ordinance enforced against federally licensed and inspected vessels found to be constitutional under dormant commerce clause analysis).

This Court has long regarded the regulation of utilities to be one of the most important of the functions traditionally associated with the police power of the States. *Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission*, 461 U.S. 375 (1983), referring to *Munn v. Illinois*, 94 U.S. 113 (1877). In the absence of conflicting legislation, this Court has concluded that the states retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected. *See Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440 (1978). In determining whether state regulation has been preempted by federal action, congressional intent to supersede state law is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state. *Huron Portland Cement, supra; Savage v. Jones*, 225 U.S. 501 (1912).

Under facts directly analogous to those presented in this case, this Court found state regulatory legislation that created a moratorium on the construction of new nuclear power plants to be constitutional, despite a clear statement of Congressional intent to promote the construction of such power plants. In the case of *Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983), this Court reviewed a California law that imposed a moratorium on the construction of new nuclear power plants until such time as the federal

government had approved a demonstrated technology or means for permanent disposal of nuclear waste. In evaluating the constitutionality of this statutory provision, this Court first examined the intent of the state statute and the Congressional intent underlying the Atomic Energy Act of 1954[20], the federal statute on which the state statute allegedly infringed. Based on its analysis, this Court concluded that the primary purpose of the Atomic Energy Act was to insure that nuclear technology would be safe enough for widespread development and use, thereby promoting the construction of nuclear power plants[21]. Therefore, this Court reasoned, had the California nuclear power plant moratorium been based on state concerns with regard to the safety of nuclear plants, it would have been preempted. However, the record clearly demonstrated that the basis for the moratorium was an economic, rather than a safety concern on the part of the state.

The state believed that the lack of a federally approved method of nuclear waste disposal created a "clog" in the nuclear fuel cycle. Without a permanent means of disposal, the state believed that the nuclear waste problem would become critical, leading to unpredictably high costs to contain the problem at the expense of California electric ratepayers and/or taxpayers. Given the non-safety purpose underlying the state moratorium, the Court upheld the

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20. § 1, *et seq.*, as amended, 42 U.S.C.A. § 2011, *et seq.*

21. The Court noted that § 274(k) of the Act, 43 U.S.C. § 2021(k) provides that: ***Nothing in this section shall be construed to affect the authority of any state or local agency to regulate activities for purposes other than protection against radiation hazards.***

constitutionality of the state statute[22]. In so doing, the Court stated that "the states have been allowed to retain authority over the need for electrical generating facilities easily sufficient to permit a state so inclined to halt the construction of new nuclear plants by refusing on economic grounds to issue certificates of public convenience in individual proceedings"[23]. The Court noted that while California is certainly free to make such decisions on a case-by-case basis, a state is not foreclosed from reaching the same decision through a legislative judgment, applicable to all cases[24]. Finally, this Court noted that

> . . . the legal reality remains that Congress has left sufficient authority in the states to allow the development of nuclear power to be slowed or even stopped for economic reasons. Given this statutory scheme, it is for Congress to rethink the division of regulatory authority in light of its possible exercise by the states to undercut a federal objective. The courts should not assume the role which our system assigns to Congress.[25]

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22. This Court determined that Congress, in passing the Atomic Energy Act and in subsequently amending it, intended that the federal government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the states retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns. 461 U.S. 190, 205.

23. *Id.* at 216.

24. *Id.* at 215.

25. *Id.* at 223.

Using the same analysis applied by the Court in *Pacific Gas & Electric, supra*, there is no suggestion of any express or implied Congressional intent to preempt the states with regard to the siting of power plants, the determination of need for new generation or the regulation of environmental issues associated with such facilities in any of the federal statutes or regulations cited by the Petitioner. The state of Florida's exercise of its police powers to control the construction of new power plants, based on considerations of need, cost and environmental impact, is no less constitutionally permissible than the exercise by the state of California of its police powers to control the construction of new nuclear power plants based on many of the same considerations.

III.

Neither The FEECA Nor The Siting Act Creates A Discriminatory Burden On Interstate Commerce That Is Cognizable Under The Dormant Commerce Clause Doctrine

In New Smyrna's view, FEECA and the Siting Act discriminate in favor of Florida utilities that have an obligation to provide bundled retail electric service to customers within the state at the expense of in-state and out-of-state generators who have no such retail service obligation and sell power only in the wholesale market, on a contract basis. It is this alleged discrimination and the implied burden on interstate commerce that provide the linchpin for New Smyrna's final preemption theory. However, this theory is also fatally flawed.

In determining whether the state has placed an undue burden on interstate commerce, it must be borne in mind that the Constitution, when conferring upon Congress the power to regulate interstate commerce, never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect interstate commerce. Legislation, in a great variety of ways, may affect interstate commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution. *Huron Portland Cement, supra*; *Collins v. American Buslines, Inc.*, 350 U.S. 528 (1956). The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). The Commerce Clause protects the interstate market, not particular interstate firms from prohibitive or burdensome regulations. *Exxon, supra*, quoting *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

In *General Motors Corporation v. Roger W. Tracy, Tax Commissioner of Ohio*, 519 U.S. 278 (1997), this Court upheld the constitutionality of Ohio's imposition of a sales and use tax on natural gas purchases from gas producers and independent gas marketers while providing a tax exemption for natural gas purchases from state-regulated natural gas utilities. In rejecting the argument that denying a tax exemption to sales made by out-of-state independent marketers but not local distribution companies ("LDC's") violates the Commerce Clause, this Court reasoned as follows.

Any notion of discrimination under the commerce clause assumes a comparison of substantially similar entities. When

the allegedly competing entities provide different products, there is a threshold question whether the companies are indeed similarly situated for constitutional purposes. If the difference in products means that the entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed, eliminating the burden would not serve the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a state on its residents or resident competitors[26]. In *General Motors*, the LDC's bundled product was supplied to a core market — typified by residential customers to whom stability of rate and supply is important — that was neither susceptible to competition by the interstate sellers nor likely to be served except by regulated natural monopolies that had historically served its needs[27]. The Court concluded that, so far as this non-competitive market was concerned, competition would not be promoted by eliminating any tax differential between the sellers, and the dormant Commerce clause, therefore, had no job to do. The Court rejected the notion that the existence of competition between marketers and LDC's in the noncaptive market required treating those entities as alike for dormant Commerce Clause purposes[28]. The Court offered the following reasons its decision to attach greater significance to the distinctiveness of the captive market and the LDC's singular role in serving that market, and hence to treat marketers and LDC's dissimilar for Commerce Clause purposes.

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26. 519 U.S. 278, 299.

27. *Id.* at 301.

28. *Id.* at 304.

> First and most important, we must recognize an obligation to proceed cautiously lest we imperil the delivery by regulated LDC's to the noncompetitive captive market. Second, as a court, we lack the expertness and the institutional resources necessary to predict the effects of judicial intervention invalidating Ohio's tax scheme on the utilities' capacity to serve this captive market. Finally, should intervention by the National Government be necessary, Congress has both the resources and the power to strike the balance between the needs of the competitive and the captive market.[29]

In this case, Tampa Electric and the other Florida utilities who, like LDCs, have an obligation to provide bundled retail service to the public and, therefore, qualify as applicants under FEECA and the Siting Act, are not similarly situated with Duke and other independent power producers do not provide bundled retail electric service in Florida. The fact that Duke and other independent power producers must make a contractual committment to serve specific retail needs for power in order to justify as a co-applicant under FEECA and the Siting Act, does not establish a discriminatory burden on interstate commerce that is cognizable under the dormant commerce clause doctrine. While New Smyrna may argue that state regulated utilities that provide bundled retail electric service and independent power producers, such as Duke, compete with regard to wholesale electric sales, such competition is not sufficient to establish the similarity that is prerequisite to a finding of a burden on interstate commerce triggering a dormant Commerce Clause analysis.

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29. *Id.* at 304.

CONCLUSION

For the foregoing reasons, the Court Should deny the Petition for Certiorari.

Respectfully submitted,

SHEILA MCDEVITT*
Vice-President and
General Counsel
HARRY W. LONG, JR.
Assistant General Counsel
TAMPA ELECTRIC COMPANY
Attorneys for Respondent
Tampa Electric Company
Post Office Box 111
Tampa, FL 33601-0111
(813) 228-1804

* *Counsel of Record*